Supreme Court, U.S.
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88-1705

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA,

Petitioner,

vs.

PARR-RICHMOND TERMINAL COMPANY, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do principles of ancillary jurisdiction create or permit federal subject matter jurisdiction over parties in private cost recovery actions under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601-9657 ("CERCLA"), where subject matter jurisdiction over such parties under CERCLA does not otherwise exist?

2. Do principles of ancillary jurisdiction create or permit federal subject matter jurisdiction over a declaratory judgment defendant in an action under CERCLA, where subject matter jurisdiction over the declaratory judgment action would not otherwise exist?

RULE 28.1 LIST

The following are either parent companies, subsidiaries (excluding wholly-owned subsidiaries) or affiliates of petitioner Montrose Chemical Corporation of California: Chris Craft Industries, Inc., Imperial Chemical Industries, PLC, ICI Americas, Inc., and Stauffer Chemical Company.

LIST OF PARTIES

Plaintiffs*

Levin Metals Corporation
Levin-Richmond Terminal Corporation

Respondents, Defendants, Counterclaimants and Appellees

Parr-Richmond Terminal Company, a dissolved corporation
John Parr Cox
Parr Industrial Corporation, a dissolved corporation
Fred Cox

Counterdefendants*

Richard Levin
Levin Metals Corporation
Levin-Richmond Terminal Corporation
United States Gypsum Company
Heckathorn & Co.
United Chemical Company (aka United-Heckathorn, United Chemetrics, Chemwest Incorporated and Chemsave, Incorporated)
Heckathorn & Company, a dissolved corporation
Atlas Chemical Company
R. J. Prentiss & Co., Inc.

Petitioner, Counterdefendant and Appellant

Montrose Chemical Corporation of California

The respondents before this Court include John Parr Cox, Parr Industrial Corporation and Fred Cox.

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* The Plaintiffs and Counterdefendants listed were not parties to the underlying appeal and are not respondents to this Petition.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 28.1 LIST i

LIST OF PARTIES ii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 2

STATUTES AND RULES INVOLVED 2

STATEMENT OF THE CASE 3

A. Parr-Richmond Removes the Underlying State Lawsuit to Federal Court 3

B. Parr-Richmond Brings a Declaratory Judgment Action Against Levin Metals, Montrose and Others 4

C. *Levin Metals I* Sets the CERCLA Jurisdictional Standard 5

D. Montrose Seeks to Dismiss Parr-Richmond's Claim 6

E. The Ninth Circuit Affirms the District Court's Denial of Montrose's Motion to Dismiss 8

I REASONS FOR GRANTING THE WRIT 9

1. THE DECISION IN *LEVIN METALS II* IS CONTRARY TO THE LANGUAGE OF CERCLA AND DECISIONS OF THIS COURT 10

A. THE DECISION IN *LEVIN METALS II* VIOLATES THE WELL-PLEADED COMPLAINT RULE FOR DECLARATORY JUDGMENT ACTIONS 12

B. THE DECISION IN *LEVIN METALS II* CONFLICTS WITH PRINCIPLES OF PENDENT AND ANCILLARY JURISDICTION 16

2. THE DECISION IN *LEVIN METALS II* ALSO DIRECTLY CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS, WHICH UNIFORMLY LOOK TO CONGRESSIONAL INTENT BEFORE PERMITTING PENDENT PARTY JURISDICTION 23

3. THE DECISION IS RIPE FOR REVIEW 26

II CONCLUSION 28

Page

APPENDIX A

Order of the United States Court of Appeals for the Ninth Circuit Denying Rehearing and Request for Rehearing *En Banc* (filed February 17, 1989) A-1

Opinion of the Ninth Circuit in *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, reported at 860 F.2d 344 (filed October 28, 1988) A-3

APPENDIX B

Amended Order of the Ninth Circuit Permitting Appeal of Interlocutory Order (filed October 27, 1987) B-1

Order of the Ninth Circuit Permitting Appeal (filed October 2, 1987) B-3

Order of the United States District Court for the Northern District of California Amending and Certifying for Appeal March 5, 1987 Interlocutory Order (filed June 26, 1987) B-4

Interlocutory Order of the District Court (filed March 5, 1987) B-7

APPENDIX C

Opinion of the Ninth Circuit in *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, reported at 799 F.2d 1312 (filed September 15, 1986) C-1

Page

APPENDIX D

United States Constitution,
Article III, Section 2 . . . . . D-1
28 U.S.C. § 1292 . . . . . D-2
28 U.S.C.A. § 2201 . . . . . D-3
42 U.S.C. § 9607 . . . . . D-4
42 U.S.C. § 9613 . . . . . D-7
Federal Rule of Civil Procedure 14 . . . . . D-9

TABLE OF AUTHORITIES

Page

Cases

Aldinger v. Howard
427 U.S. 1 (1976) 11, 14, 16-28

American Constr. Co. v. Jacksonville, T. & K.W. R. Co.
148 U.S. 372 (1893) 27

Artesian Water Co. v. Government of New Castle County
659 F. Supp. 1269 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988) 15

Birmingham Fire Insurance Co. v. Winegardner and Hammons, Inc.
714 F.2d 548 (5th Cir. 1983) 21, 22, 24

Bricklayers Fringe Benefit Funds v. North Perry Baptist Church
590 F.2d 207 (6th Cir.), *cert. denied*, 444 U.S. 834 (1979) 25

Bruner v. United States
343 U.S. 112 (1952) 27

Charles D. Bonnano Linen Service, Inc. v. McCarthy
708 F.2d 1 (1st Cir.), *cert. denied*, 464 U.S. 936 (1983) 24

City of Kenosha v. Bruno
412 U.S. 507 (1973) 10, 11, 14, 15, 22

Page

Forsyth v. City of Hammond
166 U.S. 506 (1897) 26, 27

Franchise Tax Bd. v. Construction
Laborers Vacation Trust
463 U.S. 1 (1983) 11-15, 18, 22

Haber v. County of Nassau
557 F.2d 322 (2d Cir. 1977) 25

Hallstrom v. Tillamook County
844 F.2d 598 (9th Cir. 1987),
cert. granted, 109 S. Ct. 1526 (1989) 27

Insurance Corp. of Ireland v. Compagnie
Des Bauxites
456 U.S. 694 (1982) 10

Levin Metals Corp. v. Parr-Richmond
Terminal Co. ("Levin Metals I")
799 F.2d 1312 (9th Cir. 1986) 2, 5-10, 14, 15

Levin Metals Corp. v. Parr-Richmond
Terminal Co. ("Levin Metals II") 8, 9, 11, 15, 16
860 F.2d 334 (9th Cir. 1988) 20, 23, 26-28

Long v. District of Columbia
820 F.2d 409 (D.C. Cir. 1987) 23

Lovell Mfg. v. Export-Import Bank of
the United States
843 F.2d 725 (3d Cir. 1988) 25

Moore v. Marketplace Restaurant, Inc.
754 F.2d 1336 (7th Cir. 1985) 25

Page

Mt. Healthy City School Dist. Bd. of Educ. v. Doyle
429 U.S. 274 (1977) 10

Myers v. Bethlehem Shipbuilding Corp.
303 U.S. 41 (1938) 27

National Ins. Underwriters v. Piper Aircraft Corp.
595 F.2d 546 (10th Cir. 1979) 23

Owen Equipment and Erection Co. v. Kroger 11, 14
437 U.S. 365 (1978) 16, 18-28

Public Service Comm'n of Utah v. Wycoff Co. 11-15
344 U.S. 237 (1952) 20, 22, 28

Roper v. Edwards
815 F.2d 1474 (11th Cir. 1987) 25

Skelly Oil Co. v. Phillips Petroleum Co.
339 U.S. 667 (1950) 12, 13, 15, 22

Steele v. Stephan
633 F. Supp. 950 (D. Kan. 1986) 26

Stephenson v. Esquivel
614 F. Supp. 986 (D.N.M. 1985) 26

United States ex rel. Payne v. United Pacific Ins. Co.
472 F.2d 792 (9th Cir.), *cert. denied*,
411 U.S. 982 (1973) 20, 21

Page

United States v. City of Twin Falls
806 F.2d 862 (9th Cir. 1986),
cert. denied, 107 S. Ct. 3185 (1987) 20, 21

United States v. General Motors Corp.
323 U.S. 373 (1945) 27

Statutes

28 U.S.C. § 1254 26
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1292 2
28 U.S.C. § 1292(b) 2, 8
28 U.S.C. § 1331 3
28 U.S.C. § 1332(a)(1) 18
28 U.S.C. § 1343 20
28 U.S.C. § 1349 25
28 U.S.C. § 2201 12

Labor Management Relations Act
29 U.S.C. § 185 25

42 U.S.C. §§ 1981, 1982 . . . . . 25, 26
42 U.S.C. § 1983 . . . . . 10, 11, 16, 17, 20, 25, 26

Comprehensive Environmental Response,
Compensation and Liability Act of 1980
42 U.S.C. §§ 9601-9657 . . . . . 2, 3
42 U.S.C. § 9607(a) 10, 18, 22
42 U.S.C. § 9607(a)(4)(B) 5, 10
42 U.S.C. § 9613(b) 18

Superfund Amendments and Reauthorization
Act of 1986, Pub. L. 99-499, 100 Stat. 1613
42 U.S.C. § 9613(f) 2

Page

Rules

Federal Rule of Civil Procedure
Rule 14 . . . . . 2, 20

Texts

10A C. Wright, A. Miller & M. Kane,
Federal Practice and Procedure
§ 2767 (2d ed. 1983) 12

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1988

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA,
Petitioner,

vs.

PARR-RICHMOND TERMINAL COMPANY, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioner Montrose Chemical Corporation of California ("Montrose") respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on October 28, 1988, and the denial of Montrose's petition for rehearing with request for rehearing *en banc*, entered February 17, 1989.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 860 F.2d 344, and is reprinted in Appendix A hereto, p. A-3. The Ninth Circuit's order denying rehearing and

rehearing *en banc* is not reported. It is reprinted in Appendix A hereto, p. A-1. The order of the United States District Court for the Northern District of California has not been reported. It is reprinted in Appendix B hereto, p. B-7. The District Court's amendment and certification of its order for appeal pursuant to 28 U.S.C. § 1292(b), and the Ninth Circuit's orders granting permission for leave to appeal from the certified order have not been reported. These orders are reprinted in Appendix B hereto, p. B-4, p. B-3, and p. B-1, respectively. A related opinion of the Ninth Circuit, *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, is reported at 799 F.2d 1312 (9th Cir. 1986), and is reprinted in Appendix C hereto, p. C-1.

JURISDICTION

The Ninth Circuit's opinion was entered on October 28, 1988. The Ninth Circuit denied a timely petition for rehearing and request for rehearing *en banc* on February 17, 1989. Montrose invokes the jurisdiction of this Court to review the judgment of the Ninth Circuit under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

Pertinent portions of Article III of the United States Constitution, 28 U.S.C. § 1292, and the Declaratory Judgment Act are reproduced in Appendix D to the Petition and therefore are not reproduced herein. The pertinent portions of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601-9657 ("CERCLA"), the Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499, 100 Stat. 1613 (42 U.S.C. § 9613(f)), and Rule

14 of the Federal Rules of Civil Procedure are also set forth in Appendix D hereto.

STATEMENT OF THE CASE

Montrose was initially served as a fictitious defendant ("Doe I") by respondents Parr-Richmond Terminal Company, Parr Industrial Corporation, John Parr Cox and Fred Cox (collectively referred to herein as "Parr-Richmond") in two actions in which Parr-Richmond seeks declaratory relief from liability under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601-9657 ("CERCLA"), asserting federal jurisdiction under CERCLA and 28 U.S.C. § 1331.[1]

A. Parr-Richmond Removes the Underlying State Lawsuit to Federal Court

Both of Parr-Richmond's actions against Montrose and other defendants, eventually consolidated, had their roots in a state lawsuit brought by Levin Metals Corporation, the present owner of the Richmond, California terminal site that is the subject of those actions, against Parr-Richmond, the vendor of the site. Levin Metals alleged state law claims of fraud, breach of the covenant

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[1] Montrose was *not* named as a counter-defendant in the first Parr-Richmond declaratory relief action, nor was Montrose named as a defendant in a second Parr-Richmond declaratory relief action. Montrose was later served with summonses naming it as a fictitious defendant, "Doe I," in both actions. For purposes of brevity, Montrose will refer to itself herein as one of the "declaratory judgment defendants" or "defendants" even though it was not expressly named.

of good faith and fair dealing, negligence, nuisance, and tortious breach of statutorily-imposed duty, and sought declaratory relief and indemnity. Clerk's Record ("CR") 1; Excerpts of Record ("ER") 156.[2] Parr-Richmond removed the case to the federal district court for the Northern District of California (District Court Case No. C-84-6273) on the theory that the complaint actually sought relief under CERCLA, over which the district court had exclusive jurisdiction. CR 1 (ER at 156).

B. Parr-Richmond Brings a Declaratory Judgment Action Against Levin Metals, Montrose and Others

Once in federal court, Parr-Richmond, originally a defendant in the removed action, filed a "counterclaim" against Levin Metals and various third parties seeking a declaratory judgment that Parr-Richmond has no liability under CERCLA for the damages of the declaratory judgment defendants or "at all." CR 13 (ER at 156). Parr-Richmond eventually brought Montrose into the declaratory relief action, naming Montrose as a counter-defendant. Parr-Richmond also eventually named Montrose as a defendant in a separate declaratory relief action filed by Parr-Richmond against the same defendants named in the counter suit, and seeking a virtually identical declaration of nonliability. CR 1 (ER at 176). That case, No. C-84-6324, was consolidated with the removed action, CR 179 (ER at 168); ER at 64, and the

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[2] For the convenience of the Court, Montrose cites portions of the record Montrose filed with its opening brief on appeal to the Ninth Circuit. The Excerpts of Record are paginated consecutively. The Clerk's Record for the three consolidated cases is included in the Excerpts of Record at pages 154 through 201. References to the Clerk's Record will include a parenthetical reference to its page number in the Excerpts of Record.

two cases will be referred to herein collectively as the "Removed Levin Metals action."

C. *Levin Metals I* Sets the CERCLA Jurisdictional Standard

Upon the motion of some of the defendants, the district court dismissed Parr-Richmond's complaint and counterclaim in the Removed Levin Metals action and remanded the underlying action to state court.[3] The district court found that Parr-Richmond had failed to state a claim for declaratory relief under CERCLA because, *inter alia*, Parr-Richmond had not incurred any response costs, a statutory condition precedent to recovery under CERCLA, *see* 42 U.S.C. § 9607(a)(4)(B).[4]

On Parr-Richmond's appeal of the dismissal of the Removed Levin Metals action, the Ninth Circuit reversed the dismissal of Parr-Richmond's complaint and counterclaim. *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 799 F.2d 1312 (9th Cir. 1986) ("*Levin Metals I*," attached hereto in Appendix C, p. C-1). The

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[3] On February 11, 1989, Parr-Richmond filed a cross-complaint in the state court action and named Montrose as one of several cross-defendants, asserting state law claims of comparative equitable indemnity, total equitable indemnity and declaratory relief.

[4] During the pendency of the appeal from the district court's dismissal, Levin Metals commenced yet another action against Parr-Richmond in the district court (Case No. C-85-4776-SC), seeking recovery of response costs allegedly incurred by Levin Metals. To further complicate matters, Parr-Richmond then filed a third party complaint in that case, naming many of the same parties from the Removed Levin Metals action, including Montrose, as defendants in the new action. CR 10, 11 (ER at 190); ER at 29. In an order entered December 20, 1985, the district court dismissed Parr-Richmond's third party contribution action, CR 82 (ER at 195); ER at 59, a dismissal that Parr-Richmond did not appeal.

Ninth Circuit held that the test for a valid claim for declaratory judgment of no liability under CERCLA is that the declaratory judgment *defendant* must have incurred response costs. *Levin Metals I*, 799 F.2d at 1315-16. The Court found that because defendant Levin Metals had incurred response costs and threatened action, Parr-Richmond's claim against Levin Metals had been dismissed erroneously. *Id.* at 1315-16. The Court did not discuss this test as to other defendants, but remanded to the district court for it to determine whether parties should be joined and whether Parr-Richmond had stated a claim for declaratory relief. *Id.* at 1316-17 & n.6.

D. Montrose Seeks to Dismiss Parr-Richmond's Claim

Upon remand, based upon the Ninth Circuit's decision in *Levin Metals I*, Montrose (which indisputably has *not* incurred response costs, threatened suit or made a demand upon Parr-Richmond) moved the district court to dismiss Parr-Richmond's claim against Montrose. CR 154, 155 (ER at 166). The district court denied Montrose's motion. See District Court Order filed March 5, 1987, attached hereto in Appendix B, p. B-7.

In ruling on the motion to dismiss, the district court acknowledged that *Levin Metals I* required a showing that declaratory judgment defendants have incurred response costs and threatened the declaratory judgment plaintiff with a CERCLA suit. The court apparently felt constrained by a cryptic footnote in *Levin Metals I* from applying those rules to Montrose, however. In that footnote, the Ninth Circuit observed:

> We recognize that not all of the declaratory judgment defendants claim to have incurred response costs and presented a CERCLA claim

> to Parr-Richmond. Nevertheless, all persons who have an interest in determination of the questions raised in the declaratory judgment suit should be before the court. *See Diamond Shamrock Corp. v. Lumbermens Mutual Casualty Co.*, 416 F.2d 707, 710 (7th Cir. 1969). The district court may consider on remand the propriety of joining these parties under Federal Rules of Civil Procedure 19 or 20.

799 F.2d at 1317 n.6. See Appendix C, pp. C-9, C-10.

Applying *Levin Metals I* to Montrose, the district court endeavored to reconcile the standards set forth in the seemingly conflicting portions of the Ninth Circuit's opinion:

> Confronted with this apparent inconsistancy [*sic*], this court must follow the Ninth Circuit's directions which most closely concern the parties involved in the present controversy. The Ninth Circuit, referring specifically to the declaratory judgment defendants, states that "all persons who have an interest in determination of the questions raised in the declaratory judgment suit should be before the court." Therefore, this court vacates the portions of its May 17, 1985 order . . . dealing with the dismissal of Parr-Richmond's counterclaim . . . and complaint . . . .

See Appendix B, p. B-11 (citations omitted). Thus, believing that the Ninth Circuit was requiring the joinder of all interested parties, regardless of whether a particular defendant met the statutory prerequisite of incurred response costs, the district court denied Montrose's motion to dismiss.

E. The Ninth Circuit Affirms the District Court's Denial of Montrose's Motion to Dismiss

On June 26, 1987, seeking guidance from the Ninth Circuit at Montrose's request, the district court amended its order denying Montrose's motion to dismiss, certifying the order for interlocutory review pursuant to 28 U.S.C. § 1292(b). See Appendix B, p. B-4. In orders filed October 2, 1987 and October 27, 1987, the Ninth Circuit granted permission to appeal from the certified order. See Appendix B, pp. B-1, B-3.

On appeal, the Ninth Circuit affirmed the district court's denial of Montrose's motion without addressing this Court's doctrine of pendent party jurisdiction or applying this Court's requirements for subject matter jurisdiction over declaratory judgment actions. *See Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 860 F.2d 344 (9th Cir. 1988) ("*Levin Metals II*," attached hereto in Appendix A, p. A-3). That decision affirming the denial of Montrose's motion to dismiss is the subject of this petition.

As did the district court, the Ninth Circuit in *Levin Metals II* acknowledged the prerequisite for a CERCLA action of incurred response costs set forth in *Levin Metals I*. The *Levin Metals II* panel implicitly acknowledged that Montrose did not meet those prerequisites[5] but, as did the district court, relied upon the cryptic

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[5] The *Levin Metals II* court twice suggested that Montrose did not meet jurisdictional standards for declaratory relief actions under CERCLA. At p. A-5, the court cited a Ninth Circuit case for the proposition that "courts should exercise their jurisdiction to join parties that otherwise fail to meet jurisdictional requirements." The Ninth Circuit then stated "[o]ur previous opinion in [*Levin Metals I*] acknowledged that joinder of parties not meeting the requirements announced there might be appropriate." *Id.*

footnote in *Levin Metals I*. The Ninth Circuit stated:

> Our previous opinion in this case acknowledged that joinder of parties not meeting the requirements announced there might be appropriate. Accordingly, it authorized the district judge to join "all persons who have an interest" in the question raised by Parr-Richmond's declaratory judgment suit against Levin Metals. 799 F.2d at 1317 n.6. [footnote omitted]

860 F.2d at 346 (Appendix A, p. A-5).

Finding this desire to join interested parties to be controlling over the statutory jurisdictional limitations recognized in *Levin Metals I*, the Ninth Circuit held that, rather than enforcing the statutory limitations, Parr-Richmond's declaratory action against Montrose could proceed as "ancillary to Parr-Richmond's declaratory judgment action against Levin Metals." *Id.* The Ninth Circuit did not cite or discuss any of this Court's decisions on pendent party jurisdiction or subject matter jurisdiction in declaratory judgment actions or apply those decisions to Montrose.

I

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari in this case. The Ninth Circuit's decision in *Levin Metals II* conflicts with this Court's standards for subject matter jurisdiction over declaratory relief actions and this Court's requirements for pendent party and ancillary jurisdiction. In addition, the holding of *Levin Metals II* directly conflicts with principles of subject matter, pendent and ancillary jurisdiction espoused by other Courts of Appeals that have addressed the issue. Given the inconsistency

between the Ninth Circuit decision in this case and the decisions of this Court and of other courts, Montrose respectfully requests that this Court grant a writ of certiorari.

1. THE DECISION IN *LEVIN METALS II* IS CONTRARY TO THE LANGUAGE OF CERCLA AND DECISIONS OF THIS COURT

The intent of Congress regarding proper parties under CERCLA is clear. CERCLA provides that potentially responsible parties shall be liable for "necessary costs of response *incurred by* any other person consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B) (emphasis added); *see also* 42 U.S.C. § 9607(a) (designating potentially responsible parties). In *Levin Metals I*, the Ninth Circuit recognized that Congress intended subject matter jurisdiction over declaratory claims of nonliability under CERCLA only when the declaratory judgment *defendant* has met the threshold statutory requirement of incurring response costs, and when such defendant has threatened action. *Levin Metals I*, 799 F.2d at 1315 (Appendix C, p. C-6).

It is axiomatic that principles of subject matter jurisdiction restrict the power of federal courts. *See Insurance Corp. of Ireland v. Compagnie Des Bauxites*, 456 U.S. 694, 702 (1982). In *City of Kenosha v. Bruno*, 412 U.S. 507, 511 (1973), the Court addressed the question of subject matter jurisdiction on its own motion, holding that "it is the duty of this Court to determine that the jurisdiction of the district court, limited by statute, is not exceeded." *See also Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 278-79 (1977) (noting that in a 42 U.S.C. § 1983 action it is appropriate for a court to inquire, for jurisdictional

purposes, whether a statutory action had in fact been alleged). In *City of Kenosha*, 412 U.S. at 511, the federal court's duty to examine statutory jurisdictional limitations required an examination of congressional intent underlying the federal statute allegedly providing jurisdiction, in that case, 42 U.S.C. § 1983, to determine whether Congress had negated subject matter jurisdiction over a claim against a particular party.

The Ninth Circuit's decision in *Levin Metals II*, by failing to examine congressional intent underlying CERCLA, the "anchor" federal statute, to determine whether Congress intended to exclude jurisdiction over parties such as Montrose who have not incurred response costs, conflicts with the jurisdictional limits recognized by *City of Kenosha*; with principles of pendent party jurisdiction expressed in *Aldinger v. Howard*, 427 U.S. 1 (1976), and *Owen Equipment and Erection Co. v. Kroger*, 437 U.S. 365 (1978); and with the well-established standards of federal subject-matter jurisdiction in declaratory relief actions articulated in *Public Service Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 248 (1952), and *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983). Contrary to the Ninth Circuit's decision in *Levin Metals II*, these Supreme Court cases dictate that principles of ancillary jurisdiction do not permit joinder of a pendent party when Congress expressly or impliedly has negated federal jurisdiction over the party.

A. THE DECISION IN *LEVIN METALS II* VIOLATES THE WELL-PLEADED COMPLAINT RULE FOR DECLARATORY JUDGMENT ACTIONS

The Ninth Circuit's failure to consider the statutory limits on subject matter jurisdiction as they apply to Montrose conflicts with general principles of limited federal court jurisdiction in declaratory relief actions. Those principles definitively were expressed in the seminal case *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950). The *Skelly Oil* Court reasoned that the Declaratory Judgment Act, 28 U.S.C. § 2201, had a procedural purpose only and did not extend the limited subject matter jurisdiction of federal district courts. The Court found that the plaintiff's declaratory relief action to enforce a contract did not present a federal question on the face of the complaint and therefore violated the well-pleaded complaint rule. *Id.* at 671-72. *Skelly Oil* thus stands for the principle that ' "if, but for the availability of the declaratory judgment procedure, the federal claim would arise only as a defense to a state created action, jurisdiction is lacking." ' *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 16 (1983) (quoting 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2767, at 744-45 (2d ed. 1983)).

Extending the *Skelly Oil* analysis, the Court in *Public Service Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 248 (1952), reaffirmed the principles of limited federal jurisdiction over declaratory relief actions and established the test for evaluating the existence of federal question jurisdiction when the declaratory judgment plaintiff asserts a claim that is in essence a defense to a threatened or pending action by a declaratory judgment defendant. Under *Wycoff*, the relevant claim for jurisdic-

tional purposes is that of the declaratory judgment defendant. A declaratory judgment plaintiff does not satisfy the requirements of federal jurisdiction if the anticipated lawsuit *by the declaratory judgment defendant* would not "arise under" federal law. *Wycoff*, 344 U.S. at 248.

The rule that emerges from *Skelly Oil* and *Wycoff* is that, in determining the existence of federal subject matter jurisdiction in a declaratory relief action, the court must look to the claims that would be asserted against plaintiff by the declaratory judgment defendant. Applying this basic rule, this Court subsequently held, in *Franchise Tax Board*, that a declaratory judgment action does not "arise under" federal law when Congress has designated which parties may bring actions under the federal statute at issue and either the declaratory judgment defendant or plaintiff is not within that class of persons.

In *Franchise Tax Board*, the Court was asked to determine whether a tax collection suit brought by the California Franchise Tax Board against the Construction Laborers Vacation Trust ("CLVT"), a welfare benefit trust, was removable to federal court as a federal question under the Employee Retirement Income Security Act ("ERISA"). To address the removal question, the Court first examined whether the state's declaratory judgment claims were within the scope of "federal question" jurisdiction. 463 U.S. at 8, 19. The Court recited the general test that federal question jurisdiction over declaratory judgment suits exists if the declaratory judgment *defendant* could assert a federal question if it brought a coercive action to enforce its rights. *Id.* at 19. The Court found that Section 502(a)(3) of ERISA explicitly granted trustees of ERISA-covered plans like CLVT, the declaratory judgment defendant, a cause of action for injunctive relief.

Despite this federal element, the Court nonetheless determined that with respect to the specific declaratory judgment causes of action at issue, ERISA did not manifest the requisite congressional intent to permit federal subject matter jurisdiction. Critically, with respect to the second declaratory relief cause of action, the Court looked to ERISA and found that the claim did not "arise under" ERISA because ERISA "carefully enumerate[d] the parties entitled to declaratory relief," and those parties did not include the state. *Id.* at 26-27.

Franchise Tax Board teaches that in determining whether a declaratory judgment action "arises under" federal law, the court must examine the language of the specific federal law at issue to determine whether Congress has circumscribed the proper parties to a suit under that statute. In *Franchise Tax Board*, as well as in analyses of federal subject matter jurisdiction outside the context of declaratory relief actions, this Court consistently has looked to congressional intent underlying the "anchor" federal statute to determine whether Congress has negated subject matter jurisdiction over a particular party. *See Owen Equipment and Erection Co. v. Kroger*, 437 U.S. 365 (1978); *Aldinger v. Howard*, 427 U.S. 1 (1976); *City of Kenosha v. Bruno*, 412 U.S. 507, 511 (1973).

The Ninth Circuit in *Levin Metals I* properly relied on *Wycoff* in reasoning that it had jurisdiction over Parr-Richmond's declaratory relief claims against *Levin Metals* only if Levin Metals, the declaratory judgment defendant, could have brought a coercive action in federal court to enforce its rights. *See Levin Metals I*, 799 F.2d at 1315 (Appendix C, p. C-6). In *Levin Metals I*, the Ninth Circuit recognized Congress's intent regarding the existence of subject matter jurisdiction over declaratory claims of nonliability under CERCLA: Subject matter jurisdiction arises when the declaratory

judgment *defendant* has met the threshold statutory requirement of incurring response costs, and when such defendant has threatened action. *Id.* at 1315-16 (Appendix C, pp. C-6, C-7); *see also Artesian Water Co. v. Government of New Castle County*, 659 F. Supp. 1269, 1285 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988). Montrose indisputably falls within the class of persons that Congress intended to exclude from declaratory claims of nonliability under CERCLA. Montrose has not incurred response costs and has no basis under CERCLA for an action against Parr-Richmond. Montrose therefore cannot be a proper declaratory judgment defendant.

In *Levin Metals II*, the Ninth Circuit implicitly recognized that it was bound by the principles of federal subject matter jurisdiction in declaratory relief actions set forth in *Levin Metals I* for purposes of deciding whether Parr-Richmond had stated declaratory judgment claims under CERCLA against Montrose. The Ninth Circuit nonetheless failed to apply the *Wycoff* test to Parr-Richmond's declaratory relief claims against Montrose, and to analyze whether Congress intended to exclude Montrose from federal jurisdiction under the reasoning of *City of Kenosha* and *Franchise Tax Board*. Rather than applying these jurisdictional requirements to Montrose, the Ninth Circuit ruled that the district court had "ancillary jurisdiction" over Parr-Richmond's claim against Montrose. *Levin Metals II*, 860 F.2d at 345-46 (Appendix A, p. A-5). The Ninth Circuit's approach in *Levin Metals II* thus ignores the principles of limited subject matter jurisdiction in declaratory relief actions articulated in *Skelly Oil* and *Wycoff*. In failing to apply established principles of federal subject matter jurisdiction to Montrose, the Ninth Circuit used principles of ancillary jurisdiction to create jurisdiction where none otherwise existed.

B. THE DECISION IN *LEVIN METALS II* CONFLICTS WITH PRINCIPLES OF PENDENT AND ANCILLARY JURISDICTION

In addition to controverting this Court's pronouncements regarding subject matter jurisdiction in the context of declaratory judgment actions, the *Levin Metals II* decision contravenes established limitations on pendent party and ancillary jurisdiction. This Court's decisions in *Aldinger* and *Owen* establish that principles of ancillary or pendent jurisdiction cannot extend jurisdiction to parties as to whom Congress has impliedly or expressly forbidden the exercise of federal jurisdiction. Thus, where the "anchor" claim — the federal statute creating jurisdiction — disallows the naming of particular parties, those parties cannot be "bootstrapped" into the statutory scheme by way of ancillary or pendent jurisdiction.

This rule was illustrated in *Aldinger*, wherein this Court held that a district court lacked jurisdiction over a state law claim against a county, even though the plaintiff alleged that the claim was pendent to a claim under 42 U.S.C. § 1983. The *Aldinger* Court reasoned that joinder of a new party presents a different situation from joinder of state law claims to federal claims against a party who is already present in the lawsuit:

> [I]t is quite another thing to permit a plaintiff, who has asserted a claim against one defendant with respect to which there is federal jurisdiction, to join an entirely different defendant on the basis of a state-law claim over which there is no independent basis of federal jurisdiction, simply because his claim against the first defendant and his claim against the second defendant "derive from a common nucleus of

> operative fact." . . . The addition of a new party would run counter to the well-established principle that federal courts, as opposed to state or trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress.

Aldinger, 427 U.S. at 15-16. The Court therefore held that "[b]efore it can be concluded that such jurisdiction [over a new party who is not otherwise subject to federal jurisdiction] exists, a court must satisfy itself not only that Art. III permits it, *but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence*." *Id.* at 18 (emphasis added).

In conducting this inquiry, "[t]he question . . . is whether by virtue of the statutory grant of subject-matter jurisdiction, upon which petitioners' principal claim . . . rests, Congress has addressed itself to the *party* as to whom jurisdiction pendent to the principal claim is sought." *Id.* at 16 (emphasis in original). Applying this limitation, the Court held that because 42 U.S.C. § 1983 had been interpreted not to allow jurisdiction over the county, the county could not be brought within the ambit of federal jurisdiction as a pendent party.[6]

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[6] The Court suggested that Congress's express or implied intent to negate jurisdiction over "pendent parties" should prevail even when Congress has granted exclusive jurisdiction to federal courts in the federal statute forming the primary basis for jurisdiction. Although the Court suggested in *dicta* that federal courts might have jurisdiction over "pendent parties" when Congress has granted exclusive jurisdiction to federal courts, the Court carefully avoided any hard-and-fast rules on pendent party jurisdiction. *Aldinger*, 427 U.S. at 18. The Court stated, "the question of pendent-party jurisdiction is 'subtle and complex,' and we believe that it would be as unwise as it would be unnecessary to lay down any sweeping pronouncement upon the existence or exercise of such jurisdiction." *Id.* Critically, the Court concluded, "[b]efore it can be concluded that [pendent] jurisdiction exists, a federal court must satisfy itself . . . that Congress in the statutes conferring jurisdiction has not expressly or

(continued)

In *Owen*, this Court reaffirmed *Aldinger* and held that a plaintiff could not bring a state-law claim against a nondiverse third-party defendant who had been impleaded by the defendant. 437 U.S. at 376-77. The *Owen* court examined the statute conferring jurisdiction over the federal claim (in that case the diversity statute, 28 U.S.C. § 1332(a)(1)), and found that it required complete diversity of citizenship, a limit on party joinder that could not be circumvented by ancillary jurisdiction.

The Court reasoned that the diversity statute impliedly prohibited the exercise of jurisdiction over the pendent party, who was a citizen of the same state. The Court stated, "[t]o allow the requirement of complete diversity to be circumvented as it was in this case would simply flout the congressional command." *Id.* at 377. In addition, the Court found that although Congress did not intend through the diversity statute to restrict federal courts so that they could not "resolve an entire, logically entwined lawsuit," "neither the convenience of litigants

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(ftn. continued)
by implication negated its existence." *Id.*

CERCLA combines exclusive federal jurisdiction with clear congressional intent to prohibit federal jurisdiction over parties that have not incurred response costs or threatened action. *See* 42 U.S.C. §§ 9607(a), 9613(b). Under the *Aldinger* test, a court must first look to congressional intent for express or implied negations of jurisdiction. CERCLA's congressional intent to prohibit federal court jurisdiction over parties that have not incurred response costs or threatened action therefore prohibits jurisdiction over Montrose, despite CERCLA's exclusive grant of jurisdiction to federal courts. *See also Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 & n.26 (no federal question jurisdiction in declaratory relief action where federal question jurisdiction alleged under ERISA, despite ERISA's grant of exclusive jurisdiction over some causes of action and ERISA's legislative history contemplating creation of a body of federal common law regarding private welfare and pension plans).

nor considerations of judicial economy can suffice to justify extension of the doctrine of ancillary jurisdiction to a plaintiff's cause of action against a citizen of the same State in a diversity case." *Id.*

While involving different statutory schemes, the common element of *Owen* and *Aldinger* is that the federal question that gave rise to jurisdiction was one that precluded the exercise of federal jurisdiction over the third party sought to be added to the litigation. Thus, the key inquiry under both *Aldinger* and *Owen* is whether the nature of federal jurisdiction over the "anchor" claim (*i.e.*, the claim brought by the original plaintiff against defendant) is such that it would preclude the exercise of jurisdiction over the proposed pendent party. If the federal question upon which jurisdiction is founded in the first instance expressly or impliedly forbids federal jurisdiction over the proposed third party, neither the pendent party doctrine nor principles of ancillary jurisdiction may alter that limitation.

Aldinger and *Owen* involve analyses of congressional intent to exclude parties when those parties are defendants to pendent state law claims, whereas Parr-Richmond asserts federal declaratory relief claims against Montrose. As a result of this distinction, the common element of *Aldinger* and *Owen* — that principles of ancillary or pendent jurisdiction cannot prevail over Congress's intent to exclude claims or parties — applies with greater force in this case than it does in *Aldinger* and *Owen*. In *Aldinger* and *Owen*, the Supreme Court found that Congress in the anchor federal statute had expressly or impliedly negated pendent or ancillary jurisdiction over *otherwise valid* state claims. Here, by contrast, the proposed pendent party, Montrose, is sued not on a valid state claim, but on the same federal statute as the anchor claim, *i.e.*, CERCLA, a statute which expressly does not permit the joinder of Montrose as a

party. Thus, by using ancillary jurisdiction to permit the addition of Montrose as a third-party defendant, *Levin Metals II* accomplished indirectly what cannot be done directly: federal jurisdiction over a declaratory claim of no liability against a defendant which has not incurred response costs. In short, *Levin Metals II* used principles of ancillary jurisdiction to add a party as to whom there would be no federal subject matter jurisdiction if that party had been sued directly.

Exercise of federal jurisdiction over a pendent party in a CERCLA action is thus even less permissible than was the case in *Aldinger*. In *Aldinger*, congressional intent regarding proper parties in actions under 42 U.S.C. § 1983 and 28 U.S.C. § 1343 was *implied*, *see Aldinger*, 427 U.S. at 16-17; by contrast, Congress's intent regarding proper parties under CERCLA is *express*. Under the reasoning of *Aldinger* and *Owen*, federal courts may not exercise jurisdiction over pendent parties to CERCLA actions who have not incurred response costs. The Ninth Circuit's ruling, allowing federal courts to exercise ancillary jurisdiction in a CERCLA action over a pendent party defendant that has not incurred response costs, effectively "flout[s] the congressional command" of CERCLA, and erodes the *Wycoff* standards for federal subject matter jurisdiction in declaratory relief actions.

In exercising federal jurisdiction despite the express statutory limit, the Ninth Circuit relied upon two cases: *United States ex rel. Payne v. United Pacific Ins. Co.*, 472 F.2d 792, 794 (9th Cir.), *cert. denied*, 411 U.S. 982 (1973), and *United States v. City of Twin Falls*, 806 F.2d 862, 867 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 3185 (1987). Both of these cases involve indemnity claims against a third-party defendant under the impleader rule, Federal Rule of Civil Procedure 14. Neither case cited *Aldinger* or *Owen* nor applied the *Aldinger* and *Owen*

requirement of analyzing the congressional intent underlying the anchor federal statute to determine whether Congress expressly or impliedly negated jurisdiction over the third-party defendant. Thus, *Payne* and *Twin Falls* simply do not support the exercise of ancillary jurisdiction over parties that are outside the scope of federal jurisdiction by virtue of the substantive limits of the anchor statute.

Moreover, unlike *Payne* and *Twin Falls*, the claims at issue here cannot be characterized as seeking indemnity. In each of the consolidated cases, Parr-Richmond seeks a declaration that it has no liability to Levin Metals, and no liability to Montrose; Parr-Richmond does not seek to recover response costs *from* these parties. Thus, unlike *Twin Falls* and *Payne*, Parr-Richmond does not seek to shift its liability to Montrose, and Montrose is not so situated that the adjudication of Montrose's rights will be a necessary by-product of the adjudication of Parr-Richmond's claims against Levin Metals. Parr-Richmond's claims against Montrose are therefore separate and independent from those against Levin Metals, and are thus outside the doctrine of ancillary jurisdiction, especially in the face of a primary jurisdictional statute that limits the *parties* that can be sued. *See Owen*, 437 U.S. at 376 (court distinguished an impleader by a defendant of a third-party defendant on a logically dependent claim from the facts of that case — the plaintiff in *Owen* brought a "new and independent" claim against a third-party defendant).[7] *See also Birmingham Fire Ins. Co. v. Winegardner and Hammons, Inc.*, 714 F.2d 548, 553 (5th Cir. 1983) (where a defendant impleaded third-party defendant on an

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[7] Moreover, even if Parr-Richmond's claims could be characterized as indemnity claims, *Owen* suggests that principles of ancillary jurisdiction cannot prevail over congressional intent to exclude jurisdiction over particular parties. 437 U.S. at 377.

independent claim, the independent claim was not within court's ancillary jurisdiction).

Nor does it change the outcome of this case that Parr-Richmond was sued as a defendant by Levin Metals and then cross-claimed and added defendants, including Montrose, in its separate and independent claims for relief. *See Birmingham*, 714 F.2d at 552-53 (finding it "not significant" that cross-defendant challenging jurisdiction had been sued by a cross-plaintiff who has not initiated the litigation — the fact that the cross-plaintiff was "forced" to answer the original plaintiff's complaint was "not enough to overcome the general diversity requirement").

In sum, by extending federal jurisdiction over independent CERCLA Section 107(a) claims against Montrose, the Ninth Circuit used ancillary jurisdiction to write the CERCLA limitation on party jurisdiction out of the statute and to stretch federal jurisdiction in a declaratory relief action beyond permissible limits. The court did so by failing to take the step mandated by *Franchise Tax Board*, *City of Kenosha*, *Skelly Oil*, *Wycoff*, *Aldinger* and *Owen*: analyzing the statute authorizing jurisdiction in the first instance, in this case CERCLA, to determine whether Congress has "expressly or by implication negated" jurisdiction over Montrose. Had the Ninth Circuit done so, it would have been forced to conclude that because Montrose had not incurred response costs under CERCLA, federal jurisdiction does not extend to Parr-Richmond's declaratory claims of no CERCLA liability to Montrose, and that ancillary or pendent jurisdiction cannot be used to manufacture such jurisdiction in contravention of congressional intent.

2. THE DECISION IN *LEVIN METALS II* ALSO DIRECTLY CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS, WHICH UNIFORMLY LOOK TO CONGRESSIONAL INTENT BEFORE PERMITTING PENDENT PARTY JURISDICTION

Finally, the Ninth Circuit's decision in *Levin Metals II* also directly conflicts with decisions of other Courts of Appeals, which follow the *Aldinger* and *Owen* pendent party analysis, refusing to exercise jurisdiction over pendent parties as to whom Congress expressly or impliedly has negated federal jurisdiction. The following is a brief review of but a few of those decisions.

The District of Columbia, Fifth and Tenth Circuits have followed *Owen* in holding that because Congress intended in the federal diversity statute to preclude jurisdiction over pendent parties that would destroy the requirement of complete diversity, pendent jurisdiction could not be used to create federal subject matter jurisdiction. The District of Columbia Circuit, in *Long v. District of Columbia*, 820 F.2d 409, 416 (D.C. Cir. 1987), held that congressional intent underlying the federal diversity statute prohibits a plaintiff's claim against the District of Columbia, and therefore the court could not exercise pendent jurisdiction over such claims. The court found that "[t]he diversity statute, by speaking directly to the kinds of parties who can use it to enter federal court, impliedly prohibits courts from exercising pendent party jurisdiction to hear claims against persons or entities falling outside of the statute's scope in suits based on diversity." *Id. See also National Ins. Underwriters v. Piper Aircraft Corp.*, 595 F.2d 546, 550-51 (10th Cir. 1979) (no jurisdiction over defendants as to

whom less than $10,000 was in controversy where primary jurisdictional statute was diversity statute).

Similarily, in *Birmingham Fire Insurance Co. v. Winegardner and Hammons, Inc.*, 714 F.2d 548 (5th Cir. 1983), the Fifth Circuit held that it was inappropriate to exercise ancillary jurisdiction over a cross-defendant who had been impleaded by the defendant and cross-plaintiff, Holiday Inns, on state law claims.[8] The Fifth Circuit found the facts of *Owen* "remarkably similar," and rejected Holiday Inns' attempts to distinguish *Owen* on the grounds that in *Owen*, the plaintiff initiated the joinder of another party. The Fifth Circuit stated that the distinction between a plaintiff initiating the litigation and Holiday Inns as a cross-plaintiff who did not initiate the litigation but rather was forced to answer Birmingham's motion for declaratory judgment was "not significant," and not enough to overcome Congress's intent that there be complete diversity of the parties. *Id.* at 553.

The First, Second, Third, Sixth, Seventh and Eleventh Circuits, and district courts within the Tenth Circuit, have followed the reasoning of *Aldinger* in refusing to exercise jurisdiction over "pendent parties." In *Charles D. Bonnano Linen Service, Inc. v. McCarthy*, 708 F.2d 1, 7-8 (1st Cir.), *cert. denied*, 464 U.S. 936 (1983), the First Circuit determined that because Congress intended labor organizations, but not individuals, to be proper defendants under the federal Taft-Hartley Act, a

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[8] In *Birmingham*, Hurricane Allen had severely damaged a Holiday Inns hotel. Holiday Inns brought a claim against one of its insurers, Birmingham Fire Insurance Company. Birmingham then filed suit against Holiday Inns, seeking a declaratory judgment of no liability. Holiday Inns answered the complaint, filed its own cross-complaint against Birmingham, and then amended that cross-complaint and brought in another defendant, its other insurer, Texcat, over whom there was no independent basis of subject matter jurisdiction.

plaintiff's state-law claims against pendent individuals must be dismissed.

Following *Aldinger*, the Third Circuit held that because Congress did not intend federal jurisdiction to extend to defendant Federal Credit Insurance Association, which was sued solely on state law claims appended to a federal claim under 28 U.S.C. § 1349, pendent jurisdiction would not lie to bring in that party as a defendant. *Lovell Mfg. v. Export-Import Bank of the United States*, 843 F.2d 725, 731-32 (3d Cir. 1988). The Third Circuit stated, "[t]he court in *Aldinger* plainly frowned upon appending a state law claim against a new party to a federal claim that is premised solely on a jurisdictional grant over a limited number of specific parties." *Id.* at 732.

In addition, the Sixth Circuit has held that a district court properly refused to extend its jurisdiction over state-law claims against a bank and church, which were appended to a union's federal claim against a contractor under the Labor Management Relations Act, 29 U.S.C. § 185. *Bricklayers Fringe Benefit Funds v. North Perry Baptist Church*, 590 F.2d 207, 208-09 (6th Cir.), *cert. denied*, 444 U.S. 834 (1979).

Finally, the Second, Seventh, and Eleventh Circuits, and district courts within the Tenth Circuit, have followed *Aldinger* in holding that Congress, in enacting 42 U.S.C. §§ 1981, 1982, and 1983, intended to preclude jurisdiction over particular parties, and that intent could not be circumvented through principles of pendent or ancillary jurisdiction. *See, e.g., Haber v. County of Nassau*, 557 F.2d 322, 324 (2d Cir. 1977) (Section 1983 precluded pendent jurisdiction over county, against whom only negligence was asserted); *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1353-54 (7th Cir. 1985) (no pendent jurisdiction over private party in Section 1983 action); *Roper v. Edwards*, 815

F.2d 1474, 1476-77 (11th Cir. 1987) (district court properly dismissed state claims against individual defendants after court had dismissed federal claims against them under 42 U.S.C. §§ 1981 and 1982); *Steele v. Stephan*, 633 F. Supp. 950, 952-53 (D. Kan. 1986) (dismissing claims under 42 U.S.C. § 1983 against individuals because there was no allegation they acted under color of state law, a prerequisite to jurisdiction under 42 U.S.C. § 1983); *Stephenson v. Esquivel*, 614 F. Supp. 986, 993-94 (D.N.M. 1985) (no pendent party jurisdiction over parties who had not acted under color of state law, a prerequisite to jurisdiction under the primary jurisdictional statute of that case, 42 U.S.C. § 1983).

The foregoing decisions of various courts of appeals are founded upon the rule of *Aldinger* and *Owen*: Before a court may exercise ancillary jurisdiction over a pendent party, it must determine whether Congress has impliedly or expressly negated jurisdiction over that party. The Ninth Circuit's failure in *Levin Metals II* to conduct that jurisdictional analysis as to Montrose creates a conflict with the decisions of other courts of appeals that warrants issuance of a writ of certiorari in this case.

3. THE DECISION IS RIPE FOR REVIEW

This Court has jurisdiction under 28 U.S.C. § 1254 to review decisions of the courts of appeals which do not represent final judgments. *See, e.g., Forsyth v. City of Hammond*, 166 U.S. 506 (1897). Review on certiorari is necessary to resolve an inconsistency between the decisions of the Court and the Ninth Circuit's *Levin Metals II* decision, and a conflict in the circuits created by *Levin Metals II*. This Court has granted certiorari prior to final judgment in order to resolve conflicts on

several occasions. *See, e.g., Forsyth*, 166 U.S. at 515; *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 43-44 (1938).

This Court has also granted certiorari before entry of a final judgment where the decision below presented an important question of law and where the petitioner's position, if sustained, would render the decision void. *See American Constr. Co. v. Jacksonville, T. & K.W. R. Co.*, 148 U.S. 372 (1893). The reasoning in *American Construction* controls this action. This case presents an opportunity for this Court to prevent erosion of the pendent party doctrine expressed in *Aldinger* and *Owen Equipment*, and this Court's decision would render *Levin Metals II* void. Moreover, this Court recently has recognized the importance of addressing issues arising under private environmental lawsuits by granting certiorari in *Hallstrom v. Tillamook County*, 844 F.2d 598 (9th Cir. 1987), *cert. granted*, 109 S. Ct. 1526 (1989) (No. 88-42) (effect of 60-day notice requirement in private lawsuits under Resource Conservation and Recovery Act). The Ninth Circuit's refusal to dismiss Montrose from Parr-Richmond's action is a decision on an issue that is dispositive as to the purported claims against Montrose. The Ninth Circuit's decision forces Montrose to go to the great expense of litigating a complex CERCLA action. If this Court grants the requested writ and reverses the Ninth Circuit's decision, Montrose will not be forced to defend a lawsuit before it may again challenge the federal court's jurisdiction over it. *See Bruner v. United States*, 343 U.S. 112 (1952) (granting writ of certiorari regarding jurisdictional issue).

II.

CONCLUSION

The Ninth Circuit's decision that a federal court has ancillary jurisdiction in a CERCLA action over a party who has not met the CERCLA prerequisites for federal jurisdiction directly conflicts with principles of federal subject matter jurisdiction in declaratory relief actions and with standards for pendent party and ancillary jurisdiction adopted by this Court and the other circuits following this Court's directives. The interest of judicial economy, and the importance of the issues in the underlying district court action, justify immediate correction of this conflict.

Given the Ninth Circuit's radical departure from this Court's *Wycoff, Aldinger, Owen* and other precedents, and its divergence from the uniform decisions of other circuits, petitioners respectfully request that the petition for writ of certiorari be granted and the Ninth Circuit's opinion in *Levin Metals II* be reversed.

DATED: April 19, 1989.

Respectfully submitted,

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Attorneys for Petitioner

* Counsel of Record

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
FEB 17 1989
Cathy A. Catterson, Clerk
U.S. Court of Appeals

LEVIN METALS CORPORATION, et al.,
Plaintiffs,
vs.
PARR-RICHMOND TERMINAL COMPANY, et al.,
Defendants-Counter-Claimants-Appellees,
vs.
RICHARD LEVIN, et al.,
Counterdefendants,
and
MONTROSE CHEMICAL CORPORATION OF CALIFORNIA,
Counterdefendant-Appellant.

No. 87-2732
D.C. Nos.
CV-84-6273-SC
CV-84-6324-SC

ORDER

Before: WISDOM,* THOMPSON and TROTT, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny the petition for rehearing. Judges Thompson and Trott also voted to reject the suggestion for a rehearing en banc, and Judge Wisdom recommended rejection of such suggestion.

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* Hon. John Minor Wisdom of the United States Court of Appeals for the Fifth Circuit, sitting by designation.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEVIN METALS CORPORATION, et al.,
Plaintiffs,

v.

PARR-RICHMOND TERMINAL COMPANY, et al.,
Defendants-Counter-Claimants-Appellees,

v.

RICHARD LEVIN, et al.,
Counterdefendants,

and

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA,
Counterdefendant-Appellant.

PARR-RICHMOND TERMINAL COMPANY, et al.,
Plaintiffs-Appellees,

v.

LEVIN METALS CORPORATION, et al.,
Defendants,

and

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA,
Defendant-Appellant.

No. 87-2732

D.C. Nos.
CV-84-6273-SC
CV-84-6324-SC

OPINION

Appeal from the United States District Court
for the Northern District of California
Samuel J. Conti, District Judge, Presiding

Argued and Submitted
September 13, 1988—San Francisco, California

Filed October 28, 1988

Before: John Minor Wisdom*, David R. Thompson and Stephen S. Trott, Circuit Judges.

Opinion by Judge Wisdom

COUNSEL

Arthur R. Albrecht, Thacher, Albrecht & Ratcliff, San Francisco, California, for the defendants-counterclaimants-appellees.

Kristine L. Wilkes and David L. Mulliken, Latham & Watkins, San Diego, California, for the appellant.

OPINION

WISDOM, Circuit Judge:

This appeal is controlled by our previous opinion in this case. *Levin Metals v. Parr-Richmond Terminal Company*, 799 F. 2d 1312 (9th Cir. 1986). That opinion set forth the requirements for bringing a declaratory judgment action under the Comprehensive Environmental Response, Compensation

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*Hon. John Minor Wisdom of the United States Court of Appeals for the Fifth Circuit, sitting by designation.

and Liability Act of 1980, 42 U.S.C. Section 9601 *et seq.* (CERCLA). Appellant Montrose Chemical Corporation argues that the action against it does not meet those prerequisites and should be dismissed. We hold that the action against Montrose is ancillary to Parr-Richmond's declaratory judgment action against Levin Metals. Our earlier opinion in this case established that the action against Levin Metals meets the statutory prerequisites of CERCLA. *See* 799 F. 2d at 1315. We therefore affirm the district court's denial of Montrose's motion to dismiss.

In *United States ex rel. Payne v. United Pacific Insurance Company,* we held that courts should exercise their ancillary jurisdiction to join parties that otherwise fail to meet jurisdictional requirements where both the ancillary action and the main action "involved the same core of facts and both arose out of the same transaction". 472 F. 2d 792, 794 (9th Cir.), *cert. denied,* 411 U.S. 982, 93 S.Ct. 2273, 36 L.Ed.2d 958 (1973). Parr-Richmond seeks a declaration that it is not liable to Montrose for the costs of cleaning up hazardous wastes on a parcel of land previously owned by Parr-Richmond. It asks for the same declaration, concerning the same parcel of land, in its action against Levin Metals. This "close factual and logical nexus" meets the standard set forth in *Payne. See United States v. City of Twin Falls, Idaho,* 806 F. 2d 862, 867 (9th Cir. 1986). Our previous opinion in this case acknowledged that joinder of parties not meeting the requirements announced there might be appropriate. Accordingly, it authorized the district judge to join "all persons who have an interest" in the questions raised by Parr-Richmond's declaratory judgment suit against Levin Metals. 799 F. 2d at 1317 n. 6.[1] The trial judge found that Montrose had such an interest.

[1]The relevant part of Footnote 6 reads:

> "We recognize that not all of the declaratory judgment defendants claim to have incurred response costs and presented a CERCLA claim to Parr-Richmond. Nevertheless, all persons who have

We see nothing in the record that justifies rejecting his finding.

The district court's denial of Montrose's motion to dismiss is **AFFIRMED.**

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an interest in determination of the questions raised in the declaratory judgment suit should be before the court. *See Diamond Shamrock Corp. v. Lumbermens Mutual Casualty Co.*, F.2d 707, 710 (7th Cir. 1969). The district court may consider on remand the propriety of joining these parties under Federal Rules of Civil Procedure 19 or 20."

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
OCT 27 1987
Cathy A. Catterson, Clerk
U.S. Court of Appeals

LEVIN METALS CORP., et al.,
Plaintiffs/Respondents,
vs.
PARR RICHMOND TERMINAL COMPANY, et al.,
Defendants/Counter-Claimants/Appellees,
vs.
RICHARD LEVIN, et al.,
Counter-Defendants,
and
MONTROSE CHEMICAL CORPORATION OF CALIFORNIA,
Counter-Defendant/Appellant.

No. 87-2732

DC# CV-84-6273-SC
Northern California
(San Francisco)

Nos. 87-2732 and 87-8145

PARR-RICHMOND TERMINAL COMPANY, et al.,
Plaintiffs/Appellees,
vs.
LEVIN METALS CORPORATION, et al.,
Defendants,
and
MONTROSE CHEMICAL CORPORATION OF CALIFORNIA,
Defendant/Appellant.

No. 87-8145
DC# CV-84-6324-SC
Northern california
(San Francisco)

ORDER

Before: SCHROEDER and NELSON, Circuit Judges

The petition for permission to appeal under 28 U.S.C. § 1292(b) is granted. This order replaces the order of October 2, 1987.

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october
87-8145

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
OCT 2 1987
Cathy A. Catterson, Clerk
U.S. Court of Appeals

LEVIN METALS CORP.,
Plaintiff/Respondent,
vs.
MONTROSE CHEMICAL CORPORATION OF CALIFORNIA,
Defendant/Petitioner,
and
PRENTISS DRUG & CHEMICAL COMPANY,
Defendant/Respondent,
and
PARR-RICHMOND TERMINAL COMPANY,
Defendant/Counter-Claimant/Respondent,

No. 87-8145

DC# CV-84-6273-SC
Northern California
(San Francisco)

87 - 2732

ORDER

Before: SCHROEDER AND NELSON, Circuit Judges

The petition for permission to appeal under 28 U.S.C. § 1292(b) is granted.

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cb

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFIORNIA

FILED
JUN 26 1987
William L. Whittaker
Clerk, U.S. District Court
Northern District of California

LEVIN METALS CORPORATION, et al.,
Plaintiffs,
v.
PARR-RICHMOND TERMINAL COMPANY, a dissolved corporation, et al.,
Defendants.

NO. C 84-6273 SC
NO. C 84-6324 SC
NO. C 85-4776 SC

PARR-RICHMOND TERMINAL COMPANY, a dissolved corporation, et al.,
Counter-claimants,
v.
RICHARD LEVIN, LEVIN METALS, et al.,
Counter-defendants

LEVIN METALS CORPORATION, et al.,
Plaintiffs,
v.
PARR-RICHMOND TERMINAL COMPANY, et al.,
Defendants.

ORDER AMENDING AND CERTIFYING MARCH 5, 1987 ORDER PURSUANT TO 28 U.S.C. §1292(b), AND STAY

Copies mailed to parties of record

This matter is presently before the court on the motion of Montrose Chemical Corporation of California ("Montrose") to amend and certify this court's March 5, 1987 order pursuant to 28 U.S.C. §1292(b). Parr-Richmond Terminal Company, John Parr Cox and Fred Parr Cox oppose Montrose's motion. Velsicol Chemical Corporation has filed a non-opposition to Montrose's motion.

28 U.S.C. §1292(b) provides that

> [w]hen a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order . . . .

The court amends its March 5, 1987 order to include a statement allowing for an immediate appeal pursuant to §1292(b). The court finds that its March 5, 1987 order involves a controlling question of law as to which there is substantial ground for difference of opinion. Specifically, the court points to the apparent inconsistant [*sic*] direction provided by the Ninth Circuit in *Levin Metal Corp. v. Parr-Richmond Terminal Co.*, 799 F.2d 1312 (9th Cir. 1986). *See*, March 5, 1987 Order, pp. 4-6. The court further finds that an immediate appeal from the court's March 5, 1987 order may materially advance the ultimate termination of the litigation.

The court stays further proceedings in related actions C 84-6273 SC, C 84-6324 SC and C 85-4776 SC until further notice.

In accordance with the foregoing, it is hereby ordered that:

(1) the court's March 5, 1987 order is amended to include a statement allowing for an immediate appeal pursuant to §1292(b). As amended, the court's March 5, 1987 order states that the court finds that its order involves a controlling question of law as to which there is substantial ground for difference of opinion. The court further finds that an immediate appeal from its order may materially advance the ultimate termination of the litigation; and,

(2) related actions C 84-6273 SC, C 84-6324 SC and C 85-4776 SC are stayed until further notice.

Dated: June 26, 1987.

/s/ Samuel Conti
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FILED
MAR 5 1987
William L. Whittaker
Clerk, U.S. District Court
Northern District of California

LEVIN METALS CORPORATION, et al.,
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NO. C 84-6273 SC
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v.
RICHARD LEVIN, LEVIN METALS, et al.,
Counter-defendants

ORDER

LEVIN METALS CORPORATION, et al.,
Plaintiffs,
v.
PARR-RICHMOND TERMINAL COMPANY, et al.,
Defendants.

Copies mailed to parties of record

[*sic*] Richmond Terminal Corporation (collectively referred to as "Levin Metals") purchased a shipping terminal in the City of Richmond ("Richmond terminal") from Parr-Richard Terminal Company. Levin Metals later discovered that the Richmond terminal was contaminated with toxic wastes. In February 1984, Levin Metals brought an action against Parr-Richmond Terminal Company, John Parr Cox, and Fred Cox (collectively referred to as "Parr-Richmond") in California State Superior Court. In addition to other claims, Levin Metals alleged fraud and misrepresentation in connection with the Richmond terminal purchase.

In September 1984, Parr-Richmond removed Levin Metals' action to federal court (Action No. C 84-6273) asserting that Levin Metals' complaint stated a cause of action under the Comprehensive Environmental, Response and Liability Act of 1980 ("CERCLA"). Simultaneously, Parr-Richmond filed a separate complaint (Action No. C 84-6324) seeking a declaration of nonliability under CERCLA. In October 1984, Parr-Richmond filed a counterclaim in C 84-6273 virtually identical to its complaint filed in September. Parr-Richmond served among others Montrose Chemical Corporation of California ("Montrose"), R.J. Prentiss & Co., Inc. and Prentiss Drug & Chemical Co., Inc. (collectively referred to as "Prentiss") as counterdefendants and defendants. In October 1984, both actions C 84-6273 SC and C 84-6324 SC were assigned to this court as related cases.

On May 17, 1985, the court dismissed both Parr-Richmond's counterclaim and its complaint on the ground that Parr-Richmond had not incurred CERCLA response costs consistent with the national contingency plan. *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 608 F.Supp. 1272 (N.D. Cal. 1985). The court also remanded Levin Metals' state court action for lack of

subject matter jurisdiction. *Id.* Parr-Richmond appealed this court's order of dismissal.

Pending Parr-Richmond's appeal, Levin Metals filed a separate complaint against Parr-Richmond seeking damages and declaratory relief under CERCLA (Action No. C 85-4776). C 85-4776 was assigned to this court as a related case to C 84-6273 and C 84-6324. Parr-Richmond then filed a third-party complaint against Levin Metals, Montrose, Prentiss and others seeking contribution, indemnity, and a declaration of nonliability under CERCLA. On December 20, 1985, this court dismissed Parr-Richmond's third-party complaint. Parr-Richmond did not appeal this dismissal. On March 21, 1986, this court dismissed Levin Metals' complaint C 85-4776 against the dissolved Parr Industrial Corporation. *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 631 F.Supp. 303, 304 (N.D. Cal. 1986). This court found that the California Corporation Code does not authorize a CERCLA action against a dissolved corporation based on a claim arising subsequent to its dissolution. *Id.* Levin Metals has appealed that decision and that appeal is pending.

On September 15, 1986, the Ninth Circuit reversed and remanded this court's May 17, 1985 order which dismissed Parr-Richmond's complaint C 84-6324 and counter-claim C 84-6273. *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 799 F.2d 1312 (9th Cir. 1986). The Ninth Circuit held that Parr-Richmond was not required to incur response costs before seeking declaratory relief. *Id.* at 1316. This matter is presently before the court on Prentiss' and Montrose's motion to dismiss Parr-Richmond's original complaint and counterclaim. In addition, Parr-Richmond has filed a motion for leave to amend their counterclaim C 84-6273 and complaint C 84-6324 to join additional counter-defendants and defendants. Parr-Richmond also asks this court to consolidate C 84-6273, C 84-6324 and C 85-4776.

United States Gypsum Company joins Parr-Richmond's motion. Levin Metals, Prentiss and Montrose oppose Parr-Richmond's motion to join additional defendants and counter-defendants. Montrose and Levin Metals oppose Parr-Richmond's motion for consolidation. Prentiss has filed a statement of non-opposition to Parr-Richmond's consolidation motion.

After careful study, the court draws two divergent conclusions from the Ninth Circuit's ruling. On the one hand, the circuit court states a party must satisfy three requirements to state a claim for declaration of non-liability under CERCLA. First, to assert jurisdiction, the party must show that the declaratory judgment defendant could bring a coercive CERCLA action against him. *Levin Metals*, 799 F.2d at 1315. As an example of this requirement, the Ninth Circuit states that jurisdiction exists for Parr-Richmond's claim against Levin Metals since Levin Metals has incurred response costs and threatened Parr-Richmond with a CERCLA [*sic*] his fears of CERCLA liability are sufficiently real and immediate. *Id.* at 1316. As an example of this requirement, the Ninth Circuit states that since Levin Metals notified Parr-Richmond of its pending claim for response costs, Parr-Richmond's declaratory claim against Levin Metals is ripe. *Id.* Third, the party must base its claim of nonliability on one or more of CERCLA's statutory affirmative defenses. *Id.* at 1317. The Ninth Circuit then remanded the actions to this court to determine if Parr-Richmond has stated a claim for declaratory relief. *Id.* at 1317. In summary then, the three requirements appear to mandate a showing that the declaratory judgment defendants have incurred response costs and threatened the declaratory judgment plaintiff with a CERCLA suit. However, the circuit court explicitly states that such a showing is not a prerequisite when bringing the declaratory judgment defendants before this court.

> We recognize that not all of the declaratory judgment defendants claim to have incurred response costs and presented a CERCLA claim to Parr-Richmond. *Nevertheless, all persons who have an interest in determination of the questions raised in the declaratory judgment suit should be before the court. See Diamond Shamrock Corp. v. Lumbermens Mutual Casualty Co.*, 416 F.2d 707, 710 (7th Cir. 1969). The district court may consider on remand the propriety of joining these parties under Federal Rules of Civil Procedure 19 or 20.

Id. at 1317 n.6 (emphasis added).

Confronted with this apparent inconsistancy [*sic*], this court must follow the Ninth Circuit's directions which most closely concern the parties involved in the present controversy. The Ninth Circuit, referring specifically to the declaratory judgment defendants, states that "all persons who have an interest in determination of the questions raised in the declaratory judgment suit should be before the court." *Levin Metals*, 799 F.2d at 1317 n.6. Therefore, this court vacates the portions of its May 17, 1985 order *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 608 F.Supp. 1272 (N.D. Cal. 1985) dealing with the dismissal of Parr-Richmond's counter-claim C 84-6273 and complaint C 84-6324. The court reinstates Parr-Richmond's counter-claim and complaint in accordance with the Ninth Circuit's ruling. *See Levin Metals*, 799 F.2d at 1317 n.6.

The court denies without prejudice Montrose's and Prentiss' motions to dismiss Parr-Richmond's original counter-claim and complaint. In addition, the court, aware of the Ninth Circuit's direction that all interested parties be before this court *See Levin Metals*, 799 F.2d at 1317 n.6, grants Parr-Richmond's motion to join and consolidate.

In accordance with the foregoing, it is hereby ordered that:

(1) the portions of this court's May 17, 1985 order dealing with the dismissal of Parr-Richmond's counter-claim C 84-6273 and complaint C 84-6324 are vacated;

(2) Parr-Richmond's original counter-claim and complaint are reinstated in accordance with the Ninth Circuit's ruling;

(3) Montrose's and Prentiss' motion to dismiss Parr-Richmond's original counter-claim and complaint are denied without prejudice; and,

(4) Parr-Richmond's motion to join and consolidate is granted.

Dated: March 4, 1987.

/s/ Samuel Conti
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LEVIN METALS CORPORATION, et al.,
Plaintiffs, Counter-Defendants-Appellees,

v.

PARR-RICHMOND TERMINAL CO., a dissolved corp., JOHN PARR COX, PARR INDUSTRIAL CORP. and FRED PARR COX,
Defendants, Counter-Claimants-Appellants,

v.

R. J. PRENTISS & CO., INC., a corporation,
Counter-Defendant/Appellee.

No. 85-2126
D.C. No. C-84-6273-SC

PARR-RICHMOND TERMINAL CO., a dissolved corp., JOHN PARR COX,
Plaintiffs-Appellants,

v.

RICHARD LEVIN METALS CORPORATION, et al.,
Defendants-Appellees.

No. 85-2144
D.C. No. C-84-6324-SC
OPINION

Argued and Submitted
May 14, 1986—San Francisco, California

Filed September 15, 1986

Before: Dorothy W. Nelson, William C. Canby, Jr. and John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Canby

Appeal from the United States District Court
for the Northern District of California
Samuel Conti, District Judge, Presiding

COUNSEL

Thacher, Albrecht & Ratcliff and Arthur R. Albrecht: Bronson, Bronson & McKinnon and Kenneth E. Keller, San Francisco, California, for the defendants-counterclaimants-appellants.

Latham & Watkins and David Mulliken, San Diego, California; McKenna, Conner & Cuneo and Peter Gillon, Washington, D.C.; McKenna, Conner & Cuneo and David Giannotti, San Francisco, Calfornia, for the plaintiffs-counter-defendants-appellees.

OPINION

CANBY, Circuit Judge:

Parr-Richmond appeals the dismissal of its counterclaim filed in district court action No. C-84-6273 SC (the Levin Metals action) and of its complaint filed in district court action No. C-84-6324 JPV. Both the counterclaim and the complaint sought declaratory judgment that Parr-Richmond is not liable for response costs incurred by others under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9657 (CERCLA). The district court based its dismissal on Parr-Richmond's failure to allege that it had incurred response costs under CERCLA. *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 608 F. Sup. 1272 (D.C. Cal. 1985). We reverse and remand.

FACTS:

Levin Metals Corporation and Levin-Richmond Terminal Corporation (collectively referred to as Levin Metals) purchased a parcel of land in Richmond, California, from Parr-Richmond Terminal Company in April 1981 for eight million dollars. The property was discovered to be contaminated by hazardous wastes.[1] On August 10, 1983, counsel for Levin Metals wrote to Parr-Richmond Terminal Company, Parr Industrial Corporation, John Parr Cox and Fred Cox (collectively referred to as Parr-Richmond). The letter stated:

> Demand is hereby made pursuant to Section 9612(a) of the Comprehensive Environmental Response, Claims and Liability Act that you, as a responsible party under Section 9607, reimburse Levin within sixty (60) days for the necessary costs of response it

[1]Levin Metals alleges that the property and the underlying ground water and surrounding water are contaminated with DDT, DDE, DDD, aldrin, lindane, dieldrin and heavy metals.

> has incurred to date, and assume responsibility for taking all further corrective action required by the Department of Health Services and/or other public agencies to remedy the contamination on the property.

In addition, Levin Metals indicated that it believed it had a claim against Parr-Richmond for fraud. Parr-Richmond refused to compensate Levin Metals. On February 1, 1984, Levin Metals filed in California superior court a "Complaint for Fraud, Breach of the Duty of Good Faith and Fair Dealing, Negligence, Nuisance, Tortious Breach of Statutorily Imposed Duty, Declaratory Relief and Indemnity."

In September 1984, Parr-Richmond removed the Levin Metals action to federal district court asserting that the federal court had exclusive original jurisdiction over the action pursuant to 42 U.S.C. § 9613(b). Also in September 1984, Parr-Richmond filed a complaint in federal court against Levin Metals and other parties for declaratory relief of nonliability under CERCLA. In October 1984, Parr-Richmond filed a counterclaim in the removed Levin Metals action. That counterclaim was virtually identical to the complaint Parr-Richmond had filed in September. The district court consolidated the Levin Metals action and the Parr-Richmond action as related cases.

This appeal arises from the district court's rulings on a motion to dismiss filed by Prentiss Drug & Chemical Co., Inc., and R. J. Prentiss and Co., Inc., a dissolved corporation (hereafter Prentiss). These parties were Parr-Richmond's codefendants in the Levin Metals action and defendants to the declaratory judgment complaint and counterclaim.

The district court dismissed the Parr-Richmond complaint and counterclaim for failure to state a claim under CERCLA.[2]

[2]The dismissals were as to all defendants/counter-defendants, not just Prentiss, the party bringing the motion. Montrose Chemical Corporation of California joins as appellee in this appeal.

The district court also dismissed the Levin Metals complaint for lack of federal subject matter jurisdiction and remanded it to the California court. Parr-Richmond appeals.

DISCUSSION:

[1] The district court's order remanding the Levin Metals action to state court on the ground of lack of jurisdiction is not reviewable in this appeal. 28 U.S.C. § 1447(c), (d). *See Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 351 (1976). The district court's simultaneous dismissal of Parr-Richmond's counterclaim is, however, separately reviewable if the counterclaim is supported by a basis for federal subject matter jurisdiction that exists independent of the original complaint. *See DHL Corp. v. Loomis Courier Service, Inc.*, 522 F.2d 982, 985 (9th Cir. 1975); *Pioche Mines Consol., Inc. v. Fidelity-Philadelphia Trust Co.*, 206 F.2d 336, 336-37 (9th Cir.), *cert. denied*, 346 U.S. 899 (1953); *Elliott v. Federal Home Loan Bank Bd.*, 233 F. Supp. 578; 588-89 (S.D. Cal. 1964), *reversed on other grounds*, 386 F.2d 42 (9th Cir. 1967), *cert. denied*, 390 U.S. 1011 (1968); *United States v. Professional Air Traffic Controllers Organization (PATCO)*, 504 F. Supp. 442, 443 n.1 (N.D. Ill. 1980), *reversed*, 653 F.2d 1134 (7th Cir.), *cert. denied*, 454 U.S. 1083 (1981).

Independent Basis for Federal Subject Matter Jurisdiction.

The Declaratory Judgment Act permits a federal court "in a case of actual controversy within its jurisdiction . . . [to] declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201. The Declaratory Judgment Act is not an independent source of federal subject matter jurisdiction. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950); *Janakes v. United States Postal Service*, 768 F.2d 1091, 1093 (9th Cir. 1985). It was enacted to afford an added remedy to one who is uncertain of his rights and who desires an early adjudication without having to wait

until he is sued by his adversary. *See, e.g., McGraw Edison Co. v. Preformed Line Products Co.*, 362 F.2d 339, 342 (9th Cir.) (quoting *Shell Oil Co. v. Frusetta*, 290 F.2d 689, 691-92 (9th Cir. 1961)), *cert. denied*, 385 U.S. 919 (1966).

[2] Parr-Richmond's counterclaim seeks a declaration that it had no liability under CERCLA for the response costs or damages of the declaratory judgment defendants or "at all." When a declaratory judgment plaintiff asserts a claim that is in the nature of a defense to a threatened or pending action, the character of the threatened or pending action determines whether federal question jurisdiction exists with regard to the declaratory judgment action. *Public Service Com'n of Utah v. Wycoff Co., Inc.*, 344 U.S. 237, 248 (1952); *Nuclear Engineering Co. v. Scott*, 660 F.2d 241, 253 (7th Cir. 1981), *cert. denied*, 455 U.S. 993 (1982).[3] "If. . . the *declaratory judgment defendant* could have brought a coercive action in federal court to enforce its rights," jurisdiction exists for declaratory relief. *Janakes*, 768 F.2d at 1093 (emphasis added).

[3] Of the declaratory judgment defendants here, Levin Metals could bring a coercive action against Parr-Richmond under CERCLA, because Levin Metals had alleged that it had incurred "response costs" and had threatened Parr-Richmond with a CERCLA action. That action would clearly qualify for federal question jurisdiction. Parr-Richmond's declaratory judgment counterclaim is, therefore, supported by an independent basis for federal subject matter jurisdiction. *See Janakes*, 768 F.2d at 1093-94.

[3]While it is clear that a declaratory judgment plaintiff may not premise his action on a federal defense if that question would arise only as a federal defense to a state law claim, *Janakes*, 768 F.2d at 1093, Parr-Richmond seeks an affirmative declaration of non-liability, not a declaration that it has a federal defense to a state law claim.

Stating a Claim[4]

[4] CERCLA permits a party who has incurred response costs consistent with the national contingency plan to seek recovery from others who caused the offending condition. 42 U.S.C. § 9607(a)(4)(B). The district court held that Parr-Richmond had failed to state claims for declaratory relief because it had not alleged that it had incurred necessary costs of response and that it had incurred such costs consistent with the national contingency plan. This ruling clearly put the shoe on the wrong foot. Parr-Richmond is seeking declaratory protection from a coercive CERCLA claim by Levin Metals or others; it is Levin Metal's potential complaint that must allege that Levin incurred necessary response costs consistent with the national contingency plan. To require Parr-Richmond, the potential defendant, to have incurred response costs is to impose a requirement of a plaintiff's CERCLA claim on a defendant. Imposition of such a requirement defeats the broad remedial purpose of the Declaratory Judgment Act. *See Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937).

The district court relied on *D'Imperio v. United States*, 575 F. Supp. 248 (D. N.J. 1983). In *D'Imperio*, the plaintiffs were the owners of a tract of land that was contaminated by hazardous substances. They sued for declaratory judgment (1) that they were not liable for costs to clean up the site and (2) that to the extent that they incurred necessary costs of recovery, those costs were recoverable from either the Superfund or other responsible parties. The *D'Imperio* court analyzed each claim separately. The court held that the plaintiffs' claim for a declaration of nonliability was not ripe because the EPA's actions did not "represent a finding of possible liability of sufficient immediacy to merit declaratory relief." *Id.* at 252. With regard to the plaintiffs' claim for a declaration that

[4]We review de novo a district court's dismissal for failure to state a claim. *Guillory v. County of Orange*, 731 F.2d 1379, 1381 (9th Cir. 1984).

they were entitled to reimbursement from the Superfund or other responsible parties, the court found that claim unripe because plaintiffs had not incurred any response costs. *Id.* at 253.

[5] Parr-Richmond seeks a declaration of nonliability, the first issue addressed by *D'Imperio*. An action seeking a declaration of nonliability is ripe when

> [o]ne's fears [are] sufficiently real and immediate, based on the actions or representations of one's potential adversary or based on actions one desires to take which may run afoul of a law or agreement, valid or otherwise.

Id. at 251. Application of this test to the Parr-Richmond complaint demonstrate that Parr-Richmond's claim for declaratory relief is ripe at least as to Levin Metals. Levin Metals notified Parr-Richmond of its pending claim for reimbursement of response costs. Parr-Richmond rejected that claim. Although Levin Metals had not filed a CERCLA action prior to the time Parr-Richmond brought this declaratory judgment action,[5] "[t]he actual enforcement of a statute or regulation, or the commencement of suit by a private party is no prerequisite of a suit to establish non-liability." *Id.* at 251 (citing *Doe v. Bolton*, 410 U.S. 179, 188 (1974); *Lake Carriers Ass'n. v. MacMullan*, 406 U.S. 498 (1972)).

The second ruling by the *D'Imperio* court, and the portion of the opinion on which the district court here relied, was on the plaintiffs' prayer for a declaration that, if they incurred response costs, they were entitled to reimbursement from the Superfund or someone else. The court concluded that this claim was not ripe because plaintiffs had not incurred any response costs. This portion of the *D'Imperio* decision does

[5]The parties have advised us that Levin Metals susbsequently filed a CERCLA action.

not apply to Parr-Richmond because Parr-Richmond does not seek a declaration that it is entitled to reimbursement from the Superfund or someone else. Thus, the district court's reliance on this part of *D'Imperio* is misplaced.

Conclusion

Because the district court dismissed Parr-Richmond's counterclaim and complaint on an erroneous ground, we must reverse. There still may remain questions, however, as to the sufficiency of Parr-Richmond's claims. Congress imposed strict, but not absolute, liability under CERCLA. *State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985) (discussing legislative history of CERCLA). It provided defenses to liability for "causation solely by an act of God, an act of war, or acts or omissions of a third party other than an employee or agent of the defendant or one whose act or omission occurs in connection with a contractual relationship with the defendant." *Id.*; 42 U.S.C. § 9607(b). Consequently, in order to state a claim for a declaration of nonliability, the declaratory judgment plaintiff must base its claim of nonliability on one or more of the statutory affirmative defenses.

We, therefore, reverse the dismissal of Parr-Richmond's declaratory judgment counterclaim and complaint and remand to the district court to determine in accordance with this opinion whether Parr-Richmond has stated a claim for declaratory relief.[6]

REVERSED AND REMANDED.

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[6]We recognize that not all of the declaratory judgment defendants claim to have incurred response costs and presented a CERCLA claim to Parr-Richmond. Nevertheless, all persons who have an interest in determination of the questions raised in the declaratory judgment suit should be before the court. *See Diamond Shamrock Corp. v. Lumbermens Mutual Casualty*

Co., 416 F.2d 707, 710 (7th Cir. 1969). The district court may consider on remand the propriety of joining these parties under Federal Rules of Civil Procedure 19 or 20.

We likewise leave for resolution by the district court the contention of E. J. Prentiss & Co., Inc., that no action can be maintained against it, a dissolved corporation. That contention was not a subject of the district court's ruling on appeal here, and we decline to address it in the first instance. *See Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 631 F. Supp. 303 (N.D. Cal. 1986).

APPENDIX D

UNITED STATES CONSTITUTION

ARTICLE III
(in pertinent part)

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

28 U.S.C. §1292
(in pertinent part)

§1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injuctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order. Provided, however, That application for an appeal hereunder shall not stay

proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C.A. §2201 (1988)
(in pertinent part)

§2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

42 U.S.C.A. §9607
(in pertinent part)

§9607. Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section —

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a harzardous substance, shall be liable for —

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

(b) Defenses

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by —

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

42 U.S.C. §9613
(in pertinent part)

§9613. Civil proceedings

(b) Jurisdiction; venue

Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office. For the purposes of this section, the Fund shall reside in the District of Columbia.

(e) Nationwide service of process

In any action by the United States under this chapter, process may be served in any district where the defendant is found, resides, transacts business, or has appointed an agent for the service of process.

(f) Contribution

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in

this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 or section 9607 of this title.

(2) Settlement

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(3) Persons not party to settlement

(A) If the United States or a State has obtained less than complete relief from a person who has resolved its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the State may bring an action against any person who has not so resolved its liability.

(B) A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).

(C) In any action under this paragraph, the rights of any person who has resolved its liability to the United States or a State shall be subordinate to the rights of the United States or the State. Any contribution action brought under this paragraph shall be governed by Federal law.

Federal Rule of Civil Procedure 14
(in pertinent part)

(a) When Defendant May Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party complaint not later than 10 days after serving the original answer. Otherwise the third-party plaintiff must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make any defenses to the third-party plaintiff's claim as provided in Rule 12 and any counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert any defenses as provided in Rule 12 and any counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to the third-party defendant for all or part of the claim

made in the action against the third-party defendant. The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, the claimant of the property arrested.

(b) When Plaintiff May Bring in Third Party. When a counterclaim is asserted against a plaintiff, the plaintiff may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1988

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA,
Petitioner,
vs.
PARR-RICHMOND TERMINAL COMPANY, et al.,
Respondents.

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

Donald A. Johnson being first duly sworn, deposes and says: I am a citizen of the United States and a resident of or employed in the county aforesaid. I am over the age of 18 years and not a party to the said action. My business addresss is 3550 Wilshire Blvd., Suite 916, Los Angeles, California 90010. On April 19, 1989, I served the within PETITION FOR WRIT OF CERTIORARI on the interested parties in said action by placing three true copies thereof with first-class postage fully prepaid, in the United States post office mailbox at Los Angeles, California, in sealed envelopes addressed as follows:

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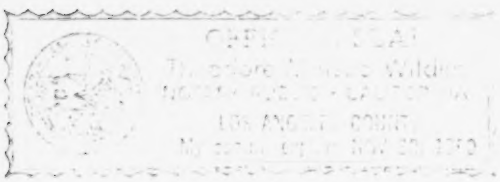
That affiant makes this service for DAVID L. MULLIKEN, Counsel of Record, LATHAM & WATKINS, Attorneys for Petitioner herein, and that to the best of my knowledge all persons required to be served in said action have been served.

Donald A. Johnson

On April 19, 1989, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Donald A. Johnson, known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

WITNESS my hand and official seal.



Notary Public in and for
said County and State

FILED
MAY 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1705

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA,
Petitioner,

vs.

PARR-RICHMOND TERMINAL COMPANY, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can a chemical company (petitioner) allegedly liable to share response costs under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. sections 9601-9657 ("CERCLA"), for its contamination of real property be subjected to the jurisdiction of the federal court as a potentially jointly liable party in a declaratory relief action initiated by the former owner (respondents) after demands under CERCLA have been made by the current owner against the former owner, so that the liability of the chemical company can be determined together with the liability of others in one and the same litigation?

2. Can a chemical company (petitioner) allegedly jointly liable for response costs be made a third party defendant in a separate action under CERCLA by the current owner against the former owner (respondents) of contaminated property?

3. Is the jurisdiction of the federal court over persons who are potentially liable to share response costs under CERCLA any less in proper declaratory relief actions than in ordinary actions?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATUTES AND RULES INVOLVED	2
STATEMENT OF THE CASE	2
A. SUMMARY	2
B. THIS LITIGATION ORIGINATED IN A FORMAL CERCLA DEMAND	4
C. PLAINTIFF LEVIN ALSO FILED A LATER CERCLA CLAIM IN FEDERAL COURT AND RESPONDENT PARR-RICHMOND FILED A THIRD PARTY COMPLAINT THEREIN AGAINST MONTROSE	4
D. PETITIONER HAS PARALYZED ALL LITIGATION PROCEEDINGS FOR OVER FOUR YEARS BY REPETITION OF DISCREDITED JURISDICTIONAL AND PROCEDURAL ARGUMENTS	6
REASONS FOR NOT GRANTING THE WRIT	7
A. SUMMARY	7
B. CERCLA DID NOT REPEAL THE JUDICIAL CODE, THE FEDERAL RULES OR THE DECLARATORY JUDGMENT ACT	8
C. THE NINTH CIRCUIT CORRECTLY HELD THAT DECLARATORY RELIEF WAS APPROPRIATE	9
D. PETITIONER'S RELIANCE ON CASES CONCERNING PENDENT JURISDICTION OVER STATE CLAIMS IS TOTALLY AMISS.	10
E. PETITIONER MISREPRESENTS RESPONDENTS' ARGUMENT	11

PAGE

F. THE DECISION IN *LEVIN METALS II* IS NOT RIPE FOR REVIEW 11

CONCLUSION 12

APPENDIX A

Federal Rules of Civil Procedure

Rule 13(a) A-1
Rule 13(b) A-1
Rule 13(h) A-1
Rule 19 ..... A-1
Rule 20 ..... A-3
Rule 54(b) A-3

TABLE OF AUTHORITIES

	PAGE
Cases	
Aldinger v. *Howard*, 427 U.S. 1 (1976)	10,11
Baker v. *Bray*, 701 F.2d 119 (10th Cir. 1983)	5
Birmingham Fire Insurance Co. v. *Winegardner and Hammonds, Inc.*, 714 F.2d 548 (5th Cir. 1983)	11
Charles D. Bonnano Linen Service, Inc. v. *McCarthy*, 708 F.2d 1 (1st Cir.), cert. denied, 464 U.S. 936 (1983)	11
Bricklayers Fringe Benefit Funds. v. *North Perry Baptist Church*, 590 F.2d 207 (6th Cir.), cert. denied, 444 U.S. 834 (1979)	11
Franchise Tax Board v. *Construction Laborers' Vacation Trust*, 463 U.S. 1 (1983)	10
Haber v. *County of Nassau*, 557 F.2d 322 (2d Cir. 1977)	11
Levin Metals Corp. v. *Parr-Richmond Terminal Co.*, 608 F. Supp. 1272 (D.C. N.Cal. 1985)	2
Levin Metals Corp. v. *Parr-Richmond Terminal Co. ("Levin Metals I")*, 799 F.2d 1312 (9th Cir. 1986)	1
Levin Metals Corp. v. *Parr-Richmond Terminal Co. ("Levin Metals II")*, 860 F.2d 334 (9th Cir. 1988)	2,11
Long v. *District of Columbia*, 820 F.2d 409 (D.C. Cir. 1987)	11
Lovell Manufacturing v. *Export-Import Bank of the United States*, 843 F.2d 725 (3d Cir. 1988)	11
Moore v. *Marketplace Restaurant, Inc.*, 754 F.2d 1336 (7th Cir. 1985)	11
National Insurance Underwriters v. *Piper Aircraft Corp.*, 595 F.2d 546 (10th Cir. 1979)	11
Owen Equipment and Erection Co. v. *Kroger*, 437 U.S. 365 (1978)	10,11

PAGE

Public Service Commission of Utah v. *Wycoff Co.*, 344 U.S. 237 (1952) 9

Roper v. *Edwards*, 815 F.2d 1474 (11th Cir. 1987) . 11

Skelly Oil Co. v. *Phillips Petroleum Co.*, 339 U.S. 667 (1950) 9

Steele v. *Stephan*, 633 F. Supp. 950 (D.Kan. 1986) 11

Stephenson v. *Esquivel*, 614 F.Supp. 986 (D.N.M. 1985) 11

Woodby v. *Chesapeake and Ohio Railway Co.* 345 F.2d 668 (6th Cir. 1965) 5

Statutes

Comprehensive Environmental Response, Compensation and Liability Act of 1980, ("CERCLA")

42 U.S.C. sections 9601-9657 2

42 U.S.C. section 9607(a) 7,10

42 U.S.C. section 9607(a)(3) 8,9,10

Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499, 100 Stat. 1613, ("SARA")

42 U.S.C. section 9613(f) 7,8

42 U.S.C. section 9613(f)(1) 8,10

Rules

Federal Civil Judicial Procedure and Rules

Rule 13(a) 2

Rule 13(b) 2

Rule 13(h) 2

Rule 14 2

Rule 19 2

Rule 20 2

Rule 54(b) 2,5

No. 88-1705

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA,
Petitioner,

vs.

PARR-RICHMOND TERMINAL COMPANY, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Parr-Richmond Terminal Company and John Parr Cox ("Parr-Richmond") respectfully pray the Court to deny the petition for writ of certiorari by Montrose Chemical Corporation of California ("Montrose") and thereby permit this litigation to proceed in the District Court after more than four years of almost total paralysis due to preoccupation with jurisdictional arguments by Montrose upon grounds held on four separate occasions below to be without merit.[1]

OPINIONS BELOW

Petitioner's statement of opinions below relegates to a last sentence reference as a "related opinion" the basic decision of the Ninth Circuit below reversing the original, erroneous opinion of the District Court. That decision of the Ninth Circuit, *Levin*

1. The litigation was commenced in September, 1984. Since Montrose was made a party in March, 1985, the litigation has been almost exclusively consumed by jurisdictional arguments, with a stay of all other proceedings. Montrose's jurisdictional arguments were rejected by decisions of the Ninth Circuit on September 15, 1986, October 28, 1988 and February 17, 1989 as set forth in Petitioner's Appendices C, A-3 and A-1 respectively, and by the decision of the U.S. District Court for the Northern District of California on March 5, 1987 set forth in Petitioner's Appendix B, p. B-7.

Metals Corp. v. *Parr-Richmond Terminal Co.* ("Levin Metals I"), 799 F.2d 1312 (9th Cir. 1986; Petitioner's Appendix C) is denominated as controlling by the later decision of the Ninth Circuit immediately preceding this petition in *Levin Metals Corp.* v. *Parr-Richmond Terminal Co.* ("Levin Metals II"), 860 F.2d 334 (9th Cir. 1988; Petitioner's Appendix A-4).

Petitioner's statement of opinions below omits reference to the original, erroneous order of the United States District Court for the Northern District of California dismissing Parr-Richmond's claims upon the ground that there could not be declaratory relief jurisdiction under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. Sections 9601-9657 ("CERCLA") as amended, for a party plaintiff who has not yet itself incurred response costs. That order, subsequently reversed by the Ninth Circuit, is reported in *Levin Metals Corp.* v. *Parr-Richmond Terminal Co.*, 608 F.Supp. 1272 (D.C. N.Cal. 1985). The relevance of this omitted opinion below is only that the argument of petitioner herein is but an enlarged rehash of that now reversed opinion seeking to create in declaratory relief actions a limitation on federal jurisdiction over persons potentially liable under CERCLA.

STATUTES AND RULES INVOLVED

Rules 13(a), 13(b), 13(h), 19, 20 and 54(b) Federal Rules of Civil Procedure ("F.R.Civ.P.") are involved in this matter as well as Rule 14 F.R.Civ.P. The pertinent portions of the above rules are not reproduced in Petitioner's Appendix and therefore are reproduced herein as Appendix A.

STATEMENT OF THE CASE

A. SUMMARY

Briefly, this case is a claim by a buyer against a seller for contamination of the sold property by the seller's lessees who processed chemicals on it for their chemical company customers over a period of years many years ago. The buyer (Levin Metals

Corporation—"Levin") first made formal demands in writing under CERCLA but then initially filed suit only in the state court under state law, vaguely adumbrating additional CERCLA claims in its state action. The seller (Parr-Richmond) removed to the federal court and filed declaratory relief claims under CERCLA both as counterclaims in the removed state action and in the form of an original declaratory relief action which was consolidated with the removed action. Petitioner Montrose was originally named as a Doe defendant in those declaratory relief actions but was served as soon as its identity as a chemical company customer was determined.

The federal court was and is the only forum in which all claims, both state and federal, could be litigated due to the exclusive federal jurisdiction over CERCLA claims.

Petitioner Montrose first took the position that there could be no jurisdiction for declaratory relief for the seller, Parr-Richmond, because Parr-Richmond had not itself incurred response costs, notwithstanding that threat of lawsuit for response costs had been made against Parr-Richmond by Levin. The District Court at first adopted Montrose's position, but the Ninth Circuit reversed. In its reversal of the District Court's decision the Ninth Circuit explained that there could be jurisdiction in a declaratory relief action where a defendant has incurred response costs and threatened action. Petitioner Montrose has latched on to that explication of the availability of declaratory relief jurisdiction and has attempted to transform that explication into a new narrow restriction on jurisdiction in declaratory relief cases under CERCLA to *only* parties defendant who have incurred response costs and threatened action, omitting all other parties who would normally be included in such litigation as potentially jointly and severally liable parties. In short, Montrose argues that federal jurisdiction over potentially jointly and severally liable parties is *less* in declaratory relief actions under CERCLA than in ordinary CERCLA actions.

Petitioner's interpretation of the law is not only contrary to the Ninth Circuit's opinion and to any rational view of declaratory

relief, but it also ignores the separate additional basis for jurisdiction in the third-party complaint filed by Parr-Richmond in the later action filed by the buyer itself under CERCLA in the federal court after the appeal from the District Court's erroneous first decision (see paragraph C below).

Petitioner Montrose, in its highly selective statement of facts, neglects to state several significant facts pointed out below:

B. THIS LITIGATION ORIGINATED IN A FORMAL CERCLA DEMAND

The origin of this litigation was a written demand by Levin upon respondents Parr-Richmond for response costs under CERCLA, as pointed out by the Ninth Circuit at the outset of its first opinion in this matter (Petitioner's Appendix C at pp. C-3 and C-4). The Ninth Circuit in its later decision deemed the earlier decision to be controlling (see Petitioner's Appendix A-4). The Ninth Circuit held that there was federal jurisdiction over Parr-Richmond's declaratory relief claim under CERCLA, which was stated both as an independent federal action and as a counterclaim in the action by Levin removed from the state court.

C. PLAINTIFF LEVIN ALSO FILED A LATER CERCLA CLAIM IN FEDERAL COURT AND RESPONDENT PARR-RICHMOND FILED A THIRD PARTY COMPLAINT THEREIN AGAINST MONTROSE

Another significant fact, relegated to footnote 4 on page 5 of petitioner's brief, is that while the first appeal was pending, the original plaintiff Levin filed its own CERCLA action in the federal court to litigate the claims in its original CERCLA demand not litigable in the state court (District Court Case No. C-85-4776, Clerk's Record ("CR") at 1, Excerpts of Record ("ER") at 190).[2] Respondent Parr-Richmond filed its third-party complaint for contribution against petitioner Montrose in the Levin

2. Respondents make reference to the Clerk's Records that are included in the Excerpts of Record for the latest appeal. There are three separate clerk's

action (CR 10 in C-85-4776, ER 190) and that third-party complaint was dismissed for lack of jurisdiction by the District Court on the ground that Parr-Richmond had not itself incurred response costs. That dismissal was without prejudice (ER 63) and not appealable (Federal Rules Civil Procedure Rule 54(b); *Baker* v. *Bray*, 701 F.2d 119 (10th Cir. 1983); *Woodby* v. *Chesapeake and Ohio Railway Co.*, 345 F.2d 668 (6th Cir. 1965). The Ninth Circuit was fully advised of all these facts while the first appeal was pending (See respondents' Supplemental Excerpts of Record ("SER") from the latest appeal at pp. 265-266 and 271-272; also see Petitioner's Appendix C at p. C-8, footnote 5). On reversal of its first erroneous decision that there was no federal jurisdiction, the District Court joined and consolidated Levin's later CERCLA action with the earlier declaratory relief action by Parr-Richmond and the declaratory relief counterclaim by Parr-Richmond in the removed state court action. The District Court also permitted the filing of third-party claims against Montrose (CR 138 in C-84-6324, ER 185). These facts are set forth in the order of the District Court from which the latest appeal was taken (see Petitioner's Appendix B at pp. B-8 and B-9). There were therefore three separate claims establishing the jurisdiction of the District Court over Montrose: (1) the declaratory relief action, (2) the declaratory relief counterclaim in the removed state court action, and (3) the third-party complaint against Montrose by Parr-Richmond in the additional Levin action under CERCLA filed while the first appeal was pending.

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records in the consolidated actions and respondents will refer to the case number when making reference to the clerk's record. Case No. C-84-6273 is Parr-Richmond's declaratory relief counterclaim, Case No. C-84-6324 is Parr-Richmond's declaratory relief complaint and C-85-4776 is Levin's later filed CERCLA complaint.

D. PETITIONER HAS PARALYZED ALL LITIGATION PROCEEDINGS FOR OVER FOUR YEARS BY REPETITION OF DISCREDITED JURISDICTIONAL AND PROCEDURAL ARGUMENTS

The tone of petitioner's statement of the case appears designed to create the totally misleading impression of a long suffering Montrose which was "eventually" named as a defendant by Parr-Richmond and that Parr-Richmond "[T]o further complicate matters..." imposed the further indignity upon Montrose of a third-party complaint for contribution after the Levin action was filed in the federal court. The truth is that Montrose has not answered or provided any discovery and has paralyzed proceedings below with prolonged repetition of unmeritorious arguments on jurisdiction.

Montrose was not immediately named as a defendant in respondents' declaratory relief claims because respondents did not then know that Montrose contaminated the property. After learning that fact through discovery from other persons, respondents named Montrose. Within seven months after the filing of the declaratory relief action, that is, in April, 1985, Montrose had been served and had filed its first round of motions for dismissal (CR 59 in C-84-6324, ER 179). The erroneous first decision in the District Court later reversed by the Ninth Circuit in 1986 (Appendix C to Petitioner's Brief) held that there could not be declaratory relief for a party who had not itself incurred response costs under CERCLA but had only been threatened with them. Notwithstanding that reversal in the first opinion of the Ninth Circuit (Petitioner's Appendix C), which Montrose apparently does not now challenge, holding that there is declaratory relief jurisdiction over a party which threatens liability for response costs, and notwithstanding the decision of the District Court to permit the third-party complaint by respondent in Levin's later filed CERCLA action, which in effect rendered moot the question of jurisdiction in the declaratory relief action, Montrose subsequently reiterated before the District Court the truncated position that there cannot also be jurisdiction in a declaratory relief

action over a potentially jointly and severally liable party where such a party has not itself threatened claims for response costs. Montrose persuaded the District Court to certify this question with a stay of all proceedings in the meantime (Petitioner's Appendix B-4 to B-6. Montrose has raised the question of reduced jurisdiction under declaratory relief actions on four occasions[3]).

In brief, Montrose has parlayed its now moot but always untenable position that there is less jurisdiction over CERCLA defendants in declaratory relief cases into a four-year freeze of the litigation below, not only against itself but with respect to all parties.

REASONS FOR NOT GRANTING THE WRIT

A. SUMMARY

Petitioner Montrose is properly a party within the jurisdiction of the District Court under CERCLA according to all applicable law, including the law of CERCLA, declaratory relief and ancillary jurisdiction, as to which there is no pertinent inconsistency in the circuits. Petitioner was properly made a party defendant to the declaratory relief claims as a person potentially liable under 42 U.S.C. Sections 9613(f) and 9607(a) and the Federal Rules of Civil Procedure. Petitioner was also properly made a party defendant in Parr-Richmond's third-party complaint in Levin's later CERCLA action because petitioner is a person potentially liable under Sections 9613(f) and 9607(a). There is no less jurisdiction of the District Court over Montrose in the declaratory relief action than in the third-party complaint.

Petitioner's fundamental but unspoken hypothesis is that somehow the ordinary principles and rules regarding jurisdiction and declaratory relief and the Federal Rules of Civil Procedure concerning additional parties were all repealed by CERCLA due to a

3. The four occasions are: (1) on renewed motion before the District Court after reversal (Petitioner's Appendix B, p. B-7); (2) on certified appeal to the Ninth Circuit; (3) on petition for rehearing and request for rehearing en banc; and (4) on this petition for writ of certiorari.

Congressional intent to limit CERCLA litigation in declaratory relief cases exclusively to parties who have either directly incurred response costs or been threatened with claims against them. Petitioner then tries to justify certiorari by elaborating from this untenable hypothesis a structure of legal interpretations of declaratory relief and ancillary jurisdiction which are simply not applicable to this case. Petitioner also discusses theories of pendent jurisdiction, which is not even an issue in this case.

B. CERCLA DID NOT REPEAL THE JUDICIAL CODE, THE FEDERAL RULES OR THE DECLARATORY JUDGMENT ACT

As petitioner would have it, no one could be a party to declaratory relief CERCLA litigation without having itself incurred response costs or threatened action on them, even though it is clear beyond doubt that other persons potentially jointly and severally liable for contribution could be made parties in ordinary litigation (42 U.S.C. Section 9613(f)). There is absolutely no warrant in CERCLA for petitioner's view. CERCLA provides for the liability of persons, who, like Montrose, have contracted for the treatment of hazardous substances (42 U.S.C. section 9607(a) (3)) so that the question of Montrose's liability arises directly and unambiguously from the statute. Moreover, Congress confirmed this view in 1986 in the Superfund Amendments and Reauthorization Act in section 9613(f) (1) (see petitioner's Appendix D-7) which provides that:

> "[A]ny person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title..." and "[S]uch claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law."

Furthermore, Congress could not reasonably have intended to require the fragmented, piecemeal and protracted successive litigations of CERCLA liability in declaratory relief cases which would necessarily result from petitioner's crabbed interpretation

of the law. Not only is there no justification in the law or cases for petitioner's views but it clearly would make no sense to permit declaratory relief in CERCLA cases, a position which petitioner apparently now accepts, but to require the tortuous route of successive litigations to complete resolution in declaratory relief cases *only*.

Petitioner cites cases to the effect that it is the duty of the Court to examine Congressional intent to determine federal subject matter jurisdiction (at pp. 10-11 of petitioner's brief). No extensive examination is required to determine that a chemical company which has arranged for the treatment of hazardous substances on the subject property is potentially liable for response costs and that federal subject matter jurisdiction exists to determine that liability under the statute and the usually applicable Federal Rules of Civil Procedure in both ordinary and declaratory relief actions.

C. THE NINTH CIRCUIT CORRECTLY HELD THAT DECLARATORY RELIEF WAS APPROPRIATE

Petitioner labors to construct from several cases wholly inapplicable here and from a convoluted misapplication of the well-pleaded complaint rule the conclusion that there was no jurisdiction over Montrose. *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, at 691-692 (1950), simply holds that federal subject matter jurisdiction does not exist if it arises only as a defense to a state law claim. That is plainly not the case here, where the claim is exclusively federal and is directly based upon the provision for liability of the petitioner: i.e. a "person who by contract, agreement or otherwise arranged for the disposal or treatment . . . of hazardous substances. . ." 42 U.S.C. 9607(a)(3).

Public Service Commission of Utah v. *Wycoff Co.*, 344 U.S. 237, at 248 (1952), merely reiterates the law recognized by the Ninth Circuit below that it is the character of the threatened action, and not of the defense, which determines declaratory relief jurisdiction. As the Ninth Circuit pointed out below this is

precisely why there was declaratory relief jurisdiction here (Petitioner's Appendix C-6 and C-7).

Franchise Tax Board v. *Construction Laborers' Vacation Trust*, 463 US 1 (1983) held that there was no federal question jurisdiction with regard to a state action for declaratory relief to establish a state right against ERISA funds. The basis of the decision was that the Court could find no congressional intent to permit declaratory relief by a party other than one specifically enumerated in that statute to be entitled to declaratory relief. CERCLA contains no such list of enumerated segregated parties exclusively entitled to declaratory relief. On the contrary the language of CERCLA and of the amendment thereto in sections 9607(a)(3) and 9613(f)(1) (Petitioner's Appendix D-4, D-7) make it plain that relief under the law, including the Declaratory Relief Act, applies to any person liable or potentially liable under section 9607(a) and under the Federal Rules of Civil Procedure and Federal law.

D. PETITIONER'S RELIANCE ON CASES CONCERNING PENDENT JURISDICTION OVER STATE CLAIMS IS TOTALLY AMISS

Petitioner also reaches for help to the totally inapplicable law regarding limitations of pendent jurisdiction over non-federal claims. *Aldinger* v. *Howard*, 427 U.S. 1, at 15-16 (1976), holds that the federal courts will not have jurisdiction over pendent state law claims where no independent federal jurisdiction exists simply because the claim derives from a common nucleus of operative fact. The claim against petitioner here is hardly a state law claim for which there exists no independent basis of federal jurisdiction. The CERCLA statute is the basis of federal jurisdiction and not only is that basis federal but it is exclusively federal. Similarly, *Owen Equipment and Erection Co.* v. *Kroger*, 437 U.S. 365 (1978), is inapposite here because it, too, involved the question of jurisdiction over a claim against a party as to whom there was no independent basis of federal jurisdiction. All of the cases cited in petitioner's brief (at pp. 23-26) under

Aldinger and *Owen* involved the question of pendent jurisdiction over state-law claims where there was no independent basis of federal jurisdiction.[4] The basis of federal jurisdiction in this case is the CERCLA statute.

E. PETITIONER MISREPRESENTS RESPONDENTS' ARGUMENT

At page 21 of its brief, petitioner incorrectly states that Parr-Richmond does not seek to recover response costs from Montrose or seek to shift its liability to Montrose so that the adjudication of Montrose's rights will be a necessary by-product of the adjudication between Parr-Richmond and Levin. This statement is, to put it politely, simply incorrect. Parr-Richmond's claims against Montrose plainly include the claim to recover against Montrose by way of contribution and indemnity (See ER 94ff.).

F. THE DECISION IN LEVIN METALS II IS NOT RIPE FOR REVIEW

The Ninth Circuit's *Levin Metals II* decision is not ripe for review. There is no final judgment. The case is in its initial stages. There is no inconsistency between the decisions of this Court and the court below and the decision below is not in conflict with the decisions of courts in other circuits. Moreover, granting certiorari at this stage will not even be dispositive of the issue of jurisdiction for Parr-Richmond's claims against Montrose inasmuch as Parr-Richmond has made and could renew its third-

4. *Long* v. *District of Columbia*, 820 F.2d 409 (D.C.Cir. 1987); *National Ins. Underwriters* v. *Piper Aircraft Corp.*, 595 F.2d 546 (10th Cir. 1979); *Birmingham Fire Ins. Co.* v. *Winegardner and Hammonds, Inc.*, 714 F.2d 548 (5th Cir. 1983); *Charles D. Bonnano Linen Service, Inc.* v. *McCarthy*, 708 F.2d 1 (1st Cir.), cert. denied, 464 U.S. 936 (1983); *Lovell Mfg.* v. *Export-Import Bank of the United States*, 843 F.2d 725 (3d Cir. 1988); *Bricklayers Fringe Benefit Funds* v. *North Perry Baptist Church*, 590 F.2d 207 (6th Cir.), cert. denied, 444 U.S. 834 (1979); *Haber* v. *County of Nassau*, 557 F.2d 322 (2d Cir. 1977); *Moore* v. *Marketplace Restaurant, Inc.*, 754 F.2d 1336 (7th Cir. 1985); *Roper* v. *Edwards*, 815 F.2d 1474 (11th Cir. 1987); *Steele* v. *Stephan*, 633 F.Supp. 950 (D.Kan. 1986); *Stephenson* v. *Esquivel*, 614 F.Supp. 986 (D.N.M. 1985).

party claims against Montrose in Levin's CERCLA action already on file without reliance on the declaratory relief part of the case. Montrose is therefore subject to the jurisdiction of the court regardless of the outcome of its petition on the declaratory relief question. Certiorari should be denied also because the action is simply one in which a party sought to be held liable for response costs has made claims under CERCLA for determination of its liability and for sharing of such costs by other persons plainly liable under the statute. There is nothing extraordinary about this case except perhaps for the length of delay which petitioner has created in reaching the merits.

CONCLUSION

Respondents Parr-Richmond Terminal Company and John Parr Cox respectfully request that the petition for writ of certiorari be denied.

DATED: May 10, 1989

Respectfully submitted,

.....

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APPENDIX A

FEDERAL RULES OF CIVIL PROCEDURE 13

Counterclaim and Cross-Claim

(a) **Compulsory Counterclaims.** A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

(b) **Permissive Counterclaims.** A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(h) **Joinder of Additional Parties.** Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20.

FEDERAL RULES OF CIVIL PROCEDURE 19

Joinder of Persons Needed for Just Adjudication

(a) **Persons to be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence completed relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the

person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party be dismissed from the action.

(b) **Determination by Court Whenever Joinder not Feasible.** If a person described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) **Pleading Reasons for Nonjoinder.** A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) **Exception of Class Actions.** This rule is subject to the provisions of Rule 23.

FEDERAL RULES OF CIVIL PROCEDURE 20

Permissive Joinder of Parties

(a) **Permissive Joinder.** All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transactions or occurrences and if any question of law or fast common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the piaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) **Separate Trials.** The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom the party asserts no claim and who asserts no claim against the party, and may order separate trials or make other orders to prevent delay or prejudice.

FEDERAL RULES OF CIVIL PROCEDURE 54

Judgments; Costs

(b) **Judgment Upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such

determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgement adjudicating all the claims and the rights and liabilities of all the parties.

No. 88-1705

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA,
Petitioner,

vs.

PARR-RICHMOND TERMINAL COMPANY, *et al.*,
Respondents.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of City of Washington, District of Columbia. I am over the age of 18 years and not a party to the said action. My business address is 2021 L Street, N.W., Washington, D.C., 20036.

On May 10, 1989, I served the within **BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI** on the interested parties in said action by placing three true copies thereof with first-class postage fully prepaid, in the United States post office mailbox at 20th and M Streets, Washington, D.C., in sealed envelopes addressed as follows:

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I make this service for ARTHUR R. ALBRECHT, Counsel of Record, THACHER, ALBRECHT & RATCLIFF, Attorneys for Respondents herein, and state that to the best of my knowledge all persons required to be served in said action have been served.

I certify under the penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on May 10, 1989 at 2021 L Street, N.W., Washington, D.C.

/s/ SHEHNAZ A. UNWALLA

SHEHNAZ A. UNWALLA